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tatus: GRANTED

ocketed:
ovember 5, 1984

Title: Theodore Cleavinger, Marvin Marcacis, and Tom P. Lockett, Petitioners
v.
David Saxner and Alfred Cain, Jr.

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Taylor Jr., G. Flint

| ntry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Aug 24 1984 | | Application for extension of time to file petition and order granting same until November 5, 1984 (Stevens, August 27, 1984). |
| 2 | Nov 5 1984 | G | Petition for writ of certiorari filed. |
| 4 | Nov 30 1984 | | Order extending time to file response to petition until December 28, 1984. |
| 5 | Dec 28 1984 | | Brief of respondents David Saxner, et al. in opposition filed. |
| 7 | Jan 2 1985 | | DISTRIBUTED. January 18, 1985 |
| 9 | Feb 1 1985 | | REDISTRIBUTED. February 15, 1985 |
| 10 | Feb 19 1985 | | Petition GRANTED. Justice Powell CUT. |
| | | | ********** |
| 12 | Mar 27 1985 | | Order extending time to file brief of petitioner on the merits until May 6, 1985. |
| 14 | Mar 27 1985 | | Order extending time to file brief of respondent on the merits until June 28, 1985. |
| 15 | Apr 5 1985 | | Joint appendix filed. |
| 16 | May 6 1985 | | Brief of petitioners Theodore Cleavinger, et al. filed. |
| 17 | May 9 1985 | | Brief amicus curiae of California, et al. filed. |
| 19 | Jun 7 1985 | | Order extending time to file brief of respondent on the merits until July 19, 1985. |
| 20 | Jul 18 1985 | | SET FOR ARGUMENT, Wednesday, October 16, 1985. (3rd case). |
| 21 | Jul 19 1985 | | Brief of respondents David Saxner, et al. filed. |
| 22 | Jul 19 1985 | | Brief amicus curiae of Prisoners' Legal Services of NY, et al. filed. |
| 23 | Aug 7 1985 | | CIRCULATED. |
| 24 | Aug 26 1985 | | Record filed. |
| 25 | Oct 16 1985 | | ARGUED. |

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No.

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CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1984

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THEODORE CLEAVINGER, MARVIN MARCADIS, AND TOM P. LOCKETT, PETITIONERS

*v.*

DAVID SAXNER AND ALFRED CAIN, JR.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

---

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## QUESTION PRESENTED

Whether members of an Institution Discipline Committee, who adjudicate cases in which prison inmates are charged with rules infractions, are entitled to absolute immunity from personal damages liability for actions taken in that quasi-judicial capacity.

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# In the Supreme Court of the United States

OCTOBER TERM, 1984

---

No.

THEODORE CLEAVINGER, MARVIN MARCADIS, AND TOM P. LOCKETT, PETITIONERS

*v.*

DAVID SAXNER AND ALFRED CAIN, JR.

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

---

The Solicitor General, on behalf of Theodore Cleavinger, Marvin Marcadis, and Tom P. Lockett, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

## OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-26a) is reported at 727 F.2d 669. The opinion of the district court denying petitioners' motion for judgment notwithstanding the verdict (App., *infra*, 27a-34a) is unreported.

## JURISDICTION

The judgment of the court of appeals (App., *infra*, 35a) was entered on February 13, 1984. A petition for rehearing was denied on June 8, 1984 (App., *infra*, 36a). On August 27, 1984, Justice Stevens extended the

time for filing a petition for a writ of certiorari to and including November 5, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In January 1975, prisoners in the federal correctional institution at Terre Haute, Indiana, engaged in a two-day strike to protest an inmate's death in the prison hospital (App., *infra*, 2a). On February 14, 1975, respondents, who were inmates at Terre Haute, were cited in separate incident reports with encouraging other prisoners to engage in another work stoppage (*id.* at 3a; PX 5, 12).[1] The following day, each respondent received a copy of the incident report as required by the Bureau of Prisons Policy Statement 7400.5C (Oct. 4, 1974) [hereinafter cited as BOP Policy Statement] (App., *infra*, 3a; PX 5, 7, 12). In accordance with Bureau of Prisons practice, respondent Saxner was given and signed a notice explaining his rights at the disciplinary hearing to be held before the Institution Discipline Committee (IDC).[2] These rights included the right to advance written notice of the charge, the right to be represented by a staff member of his choice, and the right, except where institutional safety would be impaired, to attend the hearing, to present testimony and documentary evidence, and to receive a written explanation of the IDC's decision. App., *infra*, 3a; PX 6. Following issuance of the incident reports, respondents were placed in administrative segregation (*ibid.*).[3]

Respondent Saxner appeared before the IDC on February 21, 1975. On that day, the IDC was composed of

[1] "PX" stands for plaintiffs' exhibit.

[2] The record does not reflect whether respondent Cain received a similar notice at that time (App., *infra*, 3a).

[3] Administrative segregation results in a prisoner's removal from the general inmate population for a temporary period (2 Tr. 226; 28 C.F.R. 541.20).



petitioner Cleavinger, an associate warden; petitioner Marcadis, a correctional supervisor; and petitioner Lockett, chief of case management. App., *infra*, 3a.[4] Saxner was accompanied by a staff counselor, Ralph Smith, who represented him at the hearing. After reading the charge and reviewing Saxner's rights, the IDC introduced the incident report and three documents found in Saxner's cell. The first document (PX 4) was a cover letter from Saxner to Arpiar Saunders of the National Prison Project acknowledging that Saxner had written an enclosed "press release" entitled "Prisoners at Terre Haute Seek An Investigation" (PX 1). Among other things, the press release advocated administrative approval of a prisoner's union and amnesty for those who had participated in the strike. The letter also requested that Saunders keep an "important" enclosed memo entitled "Ideals and Proposals of the Prisoner Labor Union" (PX 14). At the hearing, Saxner admitted that he had written the press release and had mailed it to persons outside the prison without authorization. Exh. N to Complaint 3-4. No guards or inmates were called as witnesses, but Saxner was permitted to testify on his own behalf and to introduce affidavits of several inmates. App., *infra*, 3a. The IDC denied Saxner's request to permit certain inmates to testify that he had not encouraged them to stop working, because their testimony would have been cumulative (*id.* at 3a n.4).[5]

[4] IDCs at Terre Haute were generally composed of three members. By regulation, at least two of these members were senior correctional officers with a rank of department head or higher. The third member was normally a less senior member of the correctional staff. Staff members who witnessed the incident were excluded from membership on the IDC unless application of that rule would preclude the impanelling of an IDC (App., *infra*, 3a n.3; PX 7, ¶ 4; see 28 C.F.R. 541.16(b)).

[5] Compare *Real* v. *Superintendent, Massachusetts Correctional Institution*, 390 Mass. 399, 456 N.E.2d 1111 (1983) (due process requires support in record of prison disciplinary pro-

After adjourning and considering the evidence, the IDC found respondent Saxner guilty of encouraging a work stoppage, in violation of prison rule 255 (BOP Policy Statement 6). In addition, based upon the documents found in Saxner's cell and his admissions at the hearing, Saxner was also found guilty of unauthorized use of the mail, in violation of rule 701 (BOP Policy Statement 6), and possession of contraband (*i.e.*, inflammatory material advocating an illegal prison union), in violation of rule 208 (BOP Policy Statement 5). The IDC ordered that Saxner be placed in administrative detention and forfeit 84 days of "good time" and recommended his transfer to another institution. App., *infra*, 4a; Exh. N to Complaint.

Respondent Cain's IDC hearing occurred the same day before the same officers (App., *infra*, 4a). He was represented at the hearing by staff representative J.R. Alvarado (PX 13). The IDC advised Cain of his rights and then produced the incident report, which contained the particulars of the work stoppage charge. Two documents found in Cain's cell—Saxner's letter to Saunders and the manuscript "Ideals and Proposals of the Prisoner Labor Union"—were also introduced. App., *infra*, 4a; PX 14. Cain testified and denied that he had encouraged other inmates not to work. He also demanded the opportunity to cross-examine his accusers. 1 Tr. 102, 104, 105. No other witnesses were called. At the conclusion of the hearing, the IDC found Cain guilty of encouraging a work stoppage and of possessing contraband, *i.e.*, "inflammatory material * * * supporting disruptive conduct in the institution." App., *infra*, 4a; PX 13. The IDC ordered that Cain be confined in administrative segregation and forfeit 96 days of good time and recommended his transfer to another institution. *Ibid.*

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ceeding for denial of prisoner's request to call witnesses), cert. granted *sub nom. Ponte* v. *Real*, No. 83-1329 (Oct. 1, 1984).



2. In accordance with the BOP Policy Statement (PX 7, ¶ 10; see 28 C.F.R. 541.19), each respondent was informed of his appeal rights at the conclusion of the IDC hearing. Respondents appealed the IDC decisions to the warden, who provided virtually all of the relief they requested. The warden ordered respondents' release from administrative segregation, restored the forfeited good time, and directed that respondents' records carry a notation that the incident should not adversely affect their consideration for parole. He refused, however, to expunge their records (App., *infra*, 4a; 1 Tr. 61, 62, 123; PX 10, 15).

Respondents appealed this one adverse ruling to the Regional Director of the Bureau of Prisons, and based upon the Regional Office's recommendation, the records of both respondents were expunged. App., *infra*, 4a-5a. Respondent Saxner was granted parole in April 1975; respondent Cain was paroled in June 1975 (1 Tr. 63, 125).

3. Meanwhile, in March 1975, respondents had brought suit in the United States District Court for the Southern District of Indiana against petitioners and other prison officials in their individual capacities.[6] Respondents' complaint, as amended, alleged that the defendants had violated respondents' rights under the First, Fourth, Sixth, and Eighth Amendments. Respondents sought declaratory and injunctive relief and a total of $75,000 in compensatory damages. App., *infra*, 5a.

Prior to trial, the district court granted petitioners' motion to dismiss the complaint on the ground that their function as IDC hearing officers entitled them to absolute immunity. Nearly two years later, however, the court reinstated the suit in light of the Seventh Cir-

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[6] Also named as defendants were the warden (Charles Benson) and the administrative supervisor (C.D. Wilson). App., *infra*, 3a n.3.

cuit's decision in *Mary & Crystal* v. *Ramsden*, 635 F.2d 590 (1980), which held that members of a disciplinary committee at a state juvenile facility were entitled to only qualified immunity. App., *infra*, 5a.

After reinstatement of the complaint, the case was tried to a jury in April 1981. In response to special interrogatories, the jury found that petitioners had violated respondents' Fifth Amendment due process rights (App., *infra*, 5a).[7] The jury awarded each respondent $4500 as compensatory damages (*ibid.*; 2 R. 370-374).

The district court denied petitioners' motion for judgment notwithstanding the verdict (App., *infra*, 27a-34a). The court appears to have found (*id.* at 29a-30a) that respondents' due process rights had been violated because (1) respondents were not given advance notice of some of the charges, (2) respondents were not allowed to call certain witnesses, and (3) the IDC relied on hearsay in support of the charges. Petitioners appealed on the grounds that they were entitled to absolute immunity and, in the alternative, that the verdicts were excessive.

4. The court of appeals affirmed by a divided vote (App., *infra*, 1a-26a). The majority opinion, written by Judge Wood and joined by Judge Cudahy, held (App., *infra*, 1a-2a) that petitioners' claim of absolute immunity was foreclosed by prior Seventh Circuit decisions denying such immunity to state correctional officers serving in a similar capacity. See *Redding* v. *Fairman*, 717 F.2d 1105, 1117 (1983); *Chavis* v. *Rowe*, 643 F.2d 1281, 1288, cert. denied, 454 U.S. 907 (1981); *Mary & Crystal* v. *Ramsden*, *supra*.[8]

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[7] Judgment was entered in favor of the other defendants (see note 6, *supra*; 2 R. 370-374). Respondents did not contest this aspect of the judgment on appeal.

[8] The court also stated (App., *infra*, 7a) that the damages awards might be "somewhat excessive," but it refused to disturb them.



Judge Celebrezze, sitting by designation, dissented. In his view, the court of appeals failed to follow this Court's analysis of the absolute immunity issue in *Butz* v. *Economou*, 438 U.S. 478 (1978). Under *Economou*, Judge Celebrezze contended, an official is entitled to absolute immunity if (1) his decisions are "functionally comparable" to those of a judge, (2) the controversies he resolves are "sufficiently intense to spawn harassing or intimidating litigation," and (3) "the adjudicatory process over which the official presides contains sufficient safeguards to lessen the 'need for individual suits to correct constitutional error'" (App., *infra*, 18a-19a (footnote omitted), quoting *Economou*, 438 U.S. at 512).

IDC members, Judge Celebrezze maintained, meet all of these requirements. He noted (App., *infra*, 22a) that they perform "the classic judicial function" of "determin[ing] whether an accused person is guilty or innocent of the charges brought against him." He also pointed out (*id.* at 23a) that IDC members face a severe threat of harassing or intimidating litigation, since "[t]he ability of prisoners to generate litigation is substantial and well documented." Finally, he argued (*ibid.*) that IDC procedures are sufficiently formal to assure that any constitutional error will either be corrected in the course of the proceeding, or avoided entirely.

In response to Judge Celebrezze's dissent, the majority opinion stated (App., *infra*, 2a n.2) that it "recognize[d] and respect[ed]" his "thoughtful contrary analysis" and added: "His arguments suggest that in due time the issue may merit reconsideration in this circuit." In view of this statement in the majority opinion, Judge Cudahy wrote a concurring opinion in support of the prior Seventh Circuit decisions (App., *infra*, 10a-16a). Judge Cudahy maintained (*id.* at 10a) that the activities and procedures of the IDC officers are "so

dissimilar in form and substance from those of judges granted absolute immunity that reliance on an all-encompassing similarity of quasi-judicial function will not wash." He also argued (*id.* at 14a-15a) that "[i]t would be poor policy to extend absolute immunity to these defendants" because "they are accorded adequate protection against harassment by the enlarged safeguards of qualified immunity as announced in *Harlow* [v. *Fitzgerald*, 457 U.S. 800 (1982)]."

Petitioners' request for rehearing en banc was denied, with four of the nine active judges voting for en banc review. App., *infra*, 36a.

**REASONS FOR GRANTING THE PETITION**

This case presents an important and frequently recurring question concerning the personal liability of correctional officials who sit on bodies that adjudicate prison disciplinary cases. Without applying the functional analysis prescribed by this Court in *Butz* v. *Economou*, 438 U.S. 478 (1978), the court below concluded that prison officials who serve on disciplinary tribunals are not entitled to absolute immunity from suits for damages based upon alleged constitutional defects in the adjudicatory proceedings. The courts of appeals are divided on this question. Compare *Ward* v. *Johnson*, 690 F.2d 1098 (4th Cir. 1982) (en banc) (absolute immunity), with the present case and *Jihaad* v. *O'Brien*, 645 F.2d 556, 561 (6th Cir. 1981) (no absolute immunity).

The personal liability of correctional officers who sit on prison disciplinary tribunals is a question of considerable practical importance. In the federal system alone, Institution Discipline Committees adjudicate more than 30,000 cases annually. If only a fraction of these cases results in *Bivens* actions alleging a deprivation of due process, correctional officials will be demoralized and intimidated, prison discipline will be impaired, and the courts will be overwhelmed with additional prisoner suits.



1. In *Butz* v. *Economou*, 438 U.S. at 508-514, this Court analyzed the factors to be considered in determining whether a government official who performs an adjudicatory function is entitled to absolute immunity.[9] The Court explained (*id.* at 512) that participants in legal proceedings, such as judges, prosecutors, and grand jurors, have traditionally enjoyed absolute immunity because of the high likelihood of retaliatory lawsuits and because "the safeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct." The Court then held (*ibid.*) that federal administrative law judges are likewise entitled to absolute immunity because their role is "functionally comparable" to that of a judge.

The Court in *Economou* did not purport to set out inflexible rules for determining whether an official is entitled to absolute immunity from personal damages liability on the ground that he performs a quasi-judicial function. However, we agree with the dissenting judge below that an official is clearly entitled to absolute immunity if it can be shown, as it was in *Economou*, that (1) the official's responsibilities, regardless of his formal position in the government hierarchy, are functionally

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[9] The Court made clear (438 U.S. at 511) that absolute immunity depends upon "the special nature of [the official's] responsibilities" rather than his rank or his "particular location within the Government." This "functional" analysis has been repeatedly reaffirmed. See, *e.g.*, *Briscoe* v. *LaHue*, 460 U.S. 325, 342 & n.28 (1983) ("[I]mmunity analysis rests on functional categories, not on the status of the defendant."); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 810 (1982). Thus, the present case is not controlled by *Procunier* v. *Navarette*, 434 U.S. 555 (1978), which held that prison officials are entitled to qualified immunity when performing the administrative task of handling prisoner mail.

comparable to those of a judge; (2) performance of his duties will make him a likely target for harassing or intimidating litigation; and (3) the adjudicatory process includes sufficient safeguards that "tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct" (438 U.S. at 512).

Application of these guidelines to the present case compels the conclusion that petitioners are entitled to absolute immunity. As the dissenting judge below observed (App., *infra*, 22a), "IDC members are involved in the classic judicial function: they are required to determine whether an accused person is guilty or innocent of the charges brought against him." See BOP Policy Statement ¶ 9(b); see also 28 C.F.R. 541.16(c); *Wolff* v. *McDonnell*, 418 U.S. 539, 571 (1974). In carrying out this responsibility, IDC members hear testimony and receive other proof, judge the credibility of witnesses, weigh the evidence, and render a final written decision. Their function is closely analogous to those of judges, grand jurors, and administrative law judges, who are absolutely immune from suit for damages. *Butz*, 438 U.S. at 512-517; *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1871).

IDC members also face a severe threat of harassing or intimidating litigation unless they are protected by absolute immunity. Prisoners as a group are prodigious and indiscriminate litigators.[10] See *Ward* v. *Johnson*, 690 F.2d at 1108. If prisoners may sue IDC members for damages based upon alleged constitutional defects in the IDC proceedings, every IDC ruling adverse to the prisoner—*e.g.*, every piece of evidence that is admitted or excluded, every continuance that is granted

[10] For example, in the year ending June 30, 1984, prisoner suits (591 cases) comprised 35% of the Seventh Circuit's civil docket (1649 cases) and 26% of its entire docket (2254 cases). Unpublished information, Administrative Office, United States Courts, Washington, D.C.



or denied, and every unfavorable finding that is made—will be a potential count in a *Bivens* suit seeking extravagant sums in compensatory and punitive damages. See *Imbler* v. *Pachtman*, 424 U.S. 409, 425 (1976). This problem will be exacerbated because of the "flexible and variable" nature of the requirements imposed by the Due Process Clause, particularly in the prison disciplinary setting. See *Hewitt* v. *Helms*, 459 U.S. 460, 472 (1983). It is clear that prison disciplinary proceedings need not be conducted like trials. *Ibid.*; *Wolff* v. *McDonnell*, 418 U.S. at 560. But the flexible nature of due process requirements will leave prisoners ample opportunity to argue that, under the circumstances of the case, the disciplinary committee departed too far from trial procedures in this or that particular.

Finally, as the present case illustrates, the procedural safeguards of an IDC proceeding provide sufficient assurance that constitutional errors will be avoided or corrected.[11] To insure impartiality, no staff member who reports or investigates an incident may sit on an IDC considering the charge. BOP Policy Statement ¶ 9(a); see 28 C.F.R. 541.16(b). In addition, the chairman and at least one other member of the committee must have the rank of department head or higher. *Ibid.*; see also notes 4 & 7, *supra*.[12] An inmate accused of misconduct is entitled to prior notice of all charges at least 24 hours before his hearing. He may select a correctional staff member as his advocate, and the IDC

[11] BOP regulations governing inmate discipline have been amplified since 1975, but even at that time the regulations "were fairly extensive." App., *infra*, 24a (footnote omitted) (Celebrezze, J., dissenting). Compare PX 7 with 28 C.F.R. 541.10-541.23 (App., *infra*, 37a-60a). Respondents' disciplinary hearing occurred less than one year after the decision in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), and only six months after promulgation of the first regulations governing the procedures at IDC hearings.

[12] Since June 1, 1983, only BOP personnel who have passed a written examination on IDC procedures may be certified to serve on an IDC.

may grant a continuance to allow the advocate to prepare. BOP Policy Statement ¶ 9(c)(1) and (2); see 28 C.F.R. 541.17(a) and (b). At the hearing, the inmate has the right to make a statement, to present documentary evidence, and, under certain circumstances, to call witnesses. BOP Policy Statement ¶ 9(c)(3); see 28 C.F.R. 541.17(c). If the IDC refuses to call a witness requested by the inmate, the reasons must be reflected in the record (*ibid.*). The inmate is generally entitled to be present at all phases of the hearing except the deliberations. BOP Policy Statement ¶ 9(c)(5); see 28 C.F.R. 541.17(d). The IDC is required to keep a detailed record of its actions sufficient to show, inter alia, the Committee's findings and decision, the specific evidence on which it relied, and an explanation for the sanctions imposed. BOP Policy Statement ¶ 9(c)(4); see 28 C.F.R. 541.17(g).

As an additional safeguard, inmates may seek administrative review at three levels—from the warden, the regional director, and the assistant director (general counsel) of the Bureau of Prisons. BOP Policy Statement ¶ 10; see 28 C.F.R. 541.19 and 28 C.F.R. Pt. 542. And as this case demonstrates, an inmate's right to administrative review is not an empty one. "[T]he efficiency of the review is demonstrated by the decision to modify, and, ultimately, to reverse the IDC's decision in this case." App., *infra*, 26a (Celebrezze, J., dissenting). Finally, a prisoner dissatisfied with the disposition of his administrative appeal may seek review under 28 U.S.C. 2241 in federal court. See, *e.g.*, *Preiser* v. *Rodriguez*, 411 U.S. 475, 487-488, 499 (1973) (state habeas corpus); *Johnson* v. *Avery*, 393 U.S. 483 (1969) (state habeas corpus); *Dawson* v. *Smith*, 719 F.2d 896 (7th Cir. 1983); *Jackson* v. *Carlson*, 707 F.2d 943, 946 (7th Cir. 1983); *Kyle* v. *Hanberry*, 677 F.2d 1386 (11th Cir. 1982).

For these reasons—the functional comparability of IDC members to judges, the certain prospects of harassing or retaliatory litigation, and the safeguards designed to prevent and correct constitutional defects—IDC members are entitled to absolute immunity from personal damages liability in suits challenging the committee's proceedings.



2. The court of appeals did not attempt to apply the absolute immunity analysis of *Butz* v. *Economou*. Instead, the court simply relied without discussion on its own precedents holding that state correctional officials who serve on disciplinary committees enjoy only qualified immunity. App., *infra*, 1a-2a; see page 6, *supra*. Moreover, none of these prior decisions discussed the important question of absolute immunity in any detail. Indeed, the only Seventh Circuit decision containing any analysis of the issue is *Mary & Crystal* v. *Ramsden*, 635 F.2d at 600, which merely stated that members of the disciplinary committee at a state juvenile facility performed a function "more similar to that of the school board members in *Wood* v. *Strickland*, 420 U.S. 308 * * * (1975), than to that of a judge." Whatever merit this analogy may have with respect to officials in a juvenile facility, it is far-fetched when applied to officials in a prison. As Judge Celebrezze aptly put it (727 F.2d at 678 n.5): "The difference between the function performed by prison officials and the function performed by school board members is as great as the difference between prisoners and schoolchildren." Furthermore, the procedures followed by the school officials in *Wood* (see 420 U.S. at 312-313) share none of the formality of IDC proceedings. Finally, the Court stated in *Wood* (*id.* at 320) that "absolute immunity * * * would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner." The same is emphatically not true of IDC members.

3. a. The court of appeals' decision in this case is consistent with that of the Sixth Circuit in *Jihaad* v.

*O'Brien*, 645 F.2d 556, 561 (1981)—a decision that is likewise devoid of supporting analysis. However, the decision below conflicts with that of the Fourth Circuit sitting en banc in *Ward* v. *Johnson*, 690 F.2d 1098 (1982).[13] In *Ward*, a state prison inmate filed an action for damages under 42 U.S.C. 1983 claiming that his federal constitutional rights had been violated in the course of a disciplinary hearing conducted by the prison Adjustment Committee, a body analogous in function, composition, and procedure to a federal prison IDC. The alleged constitutional violation was the refusal by the chairman of the Adjustment Committee to call the inmate's witnesses on the ground that their testimony would be repetitive of the written statements they had already provided. 690 F.2d at 1102.

Applying the guidelines in *Economou*, the Fourth Circuit held that the chairman was entitled to absolute immunity. The court of appeals found (690 F.2d at 1106) that there was an "obvious 'functional comparability'" between the chairman's duties on the Adjustment Committee and a judge's responsibilities in a judicial proceeding. The court also concluded (*id.* at 1106-1108) that the Adjustment Committee's procedures, which are generally similar to those of the federal IDCs, provided sufficient safeguards against unconstitutional conduct. The court noted (*id.* at 1106) that the proceedings

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[13] For district court decisions in agreement with *Ward*, see *Anderson* v. *Luther*, 521 F. Supp. 91, 97 (N.D. Ill. 1981) (*Bivens* suit); *Breedlove* v. *Cripe*, 511 F.Supp. 467 (N.D. Tex. 1981) (*Bivens* suit); *Fitchette* v. *Collins*, 402 F.Supp. 147 (D. Md. 1975) (action under 42 U.S.C. 1983). See also *Stewart* v. *Thigpen*, 730 F.2d 1002, 1006 n.1 (5th Cir. 1984) (district court decision held prison officials on disciplinary committee entitled to absolute immunity; court of appeals did not reach issue). Cf. *Simons* v. *Bellinger*, 643 F.2d 774 (D.C. Cir. 1980) (granting absolute immunity to individuals appointed to serve on the District of Columbia Court of Appeals Committee on Unauthorized Practice).



are adversarial in nature and that the prisoner may secure representation, introduce evidence, and question adverse witnesses (*ibid.*). The court also pointed out (*id.* at 1107-1108) that prison officials familiar with the events at issue are disqualified from serving on the Adjustment Committee and that prisoners have the right to two levels of administrative review.

Finally, the Fourth Circuit observed (690 F.2d at 1108) that the denial of absolute immunity would create "a real threat of burdensome and expensive litigation." The court continued (*ibid.*; footnote omitted):

> The proclivities of prison inmates to engage in litigation are prodigious. It has been estimated that between 30 and 40 percent of our appeals in this Circuit concern proceedings by prison inmates. That burden on the courts will be immeasurably increased by allowing suits arising out of disciplinary hearings which have been as carefully structured as this one has been in order to provide every reasonable "safeguard" of an inmate's right to a fair and impartial hearing within the prison context.
> * * *
>
> Moreover, lawsuits, whether meritorious or not, are always burdensome, harassing, and time-consuming. It is difficult enough to secure qualified prison employees. That task will be made more difficult, particularly in securing officials to serve on Adjustment Committees, if, however fair they try to be, such officials are subjected to the hazards of repeated litigation by disappointed defendants in disciplinary hearings. Ordinarily, prison officials are not generously rewarded for their services and the threat of an award against them personally would be a hazard many would feel themselves not justified in risking. The prison system itself will also likely be seriously hampered by a denial to the members of the Adjustment Committee [of] absolute immunity, since prison employees will unquestionably be resistant to accepting appointment as

members of an Adjustment Committee if acceptance entails the serious hazard of being sued personally for their actions strictly as members of the Committee.

b. The situation in *Ward* cannot be meaningfully distinguished from that in the present case. The mere fact that *Ward* involved a state, rather than a federal, prison official obviously does not matter, especially since the court of appeals' decision in this case was founded upon its prior decisions involving state officers.[14]

It is true that the procedures of the state prison Adjustment Committee in *Ward* differ somewhat from those of the federal IDCs,[15] but there is no hint in the Fourth or Seventh Circuit decisions that these differences were responsible for the conflicting results. On the contrary, in *Redding* v. *Fairman*, 717 F.2d at 1117, the Seventh Circuit rejected *Ward* as not representing "the better view." Similarly in this case, the majority followed *Redding* (App., *infra*, 1a-2a), and Judge Cudahy, in concurrence, specifically rejected *Ward* once again (App., *infra*, 10a-11a & n.3).[16]

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[14] It would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." *Butz* v. *Economou*, 438 U.S. at 504; *Harlow* v. *Fitzgerald*, 457 U.S. at 809.

[15] For example, under the Virginia system, an inmate has the right to be represented by counsel and to confront and cross-examine adverse witnesses. Neither the Due Process Clause (*Baxter* v. *Palmigiano*, 425 U.S. 308, 320-323 (1976); *Wolff* v. *McDonnell*, 418 U.S. 539, 567-570 (1974)) nor federal prison rules (see pages 11-12, *supra*) provide such rights.

[16] The Fourth Circuit suggested in *Ward* that absolute immunity might not be available if a prison disciplinary hearing denied any semblance of due process. 690 F.2d at 1108-1109. There is no reason to believe that the Fourth Circuit would view that exception as applicable here. (Continued.)



4. The immunity of prison officials who serve on disciplinary committees is an issue of substantial practical importance that requires prompt resolution by this Court. "The administration of a prison * * * is 'at best an extraordinarily difficult undertaking.'" *Hudson* v. *Palmer*, No. 82-1630 (July 3, 1984), slip op. 9, quoting *Wolff* v. *McDonnell*, 418 U.S. at 566. See also *Hewitt* v. *Helms*, 459 U.S. at 467. "Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial, criminal, and often violent, conduct." *Hudson* v. *Palmer*, slip op. 8. "Prison life, and relations between the inmates themselves and between the inmates and prison officials or staff, contain the ever-present potential for violent confrontation and conflagration." *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119, 132 (1977). Thus, "central to all other corrections goals is the institutional consideration of internal security." *Pell* v. *Procunier*,

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The judgments against petitioners were based on three alleged violations of due process. One of these—the refusal to call defense witnesses whose testimony was believed to be cumulative—was the same violation alleged in *Ward*. Another alleged defect—the failure to call live witnesses in support of the charges—was no violation at all. *Baxter* v. *Palmigiano*, 425 U.S. at 320-323; *Wolff* v. *McDonnell*, 418 U.S. at 567-569. The final alleged defect was the failure to provide adequate notice of the charges of possessing contraband and unauthorized use of the mail. This defect was surely not so great as to distinguish the present case from *Ward*. While an inmate's right to 24 hours notice of disciplinary charges was established in *Wolff*, it is at least arguable that *Wolff* does not apply to the situation here. In this case, the evidence supporting the new charges was originally introduced to prove the charges on the incident reports. Respondent Saxner then admitted that he had committed the additional offenses; and in any event, respondents' possession of the documents was essentially incontrovertible. Moreover, the new charges were no more serious than those in the incident reports, and there is no indication that the new charges resulted in the imposition of any additional punishment.

417 U.S. 817, 823 (1974). However, maintaining order, safety, and discipline in a prison is a formidable task, as events in recent years have dramatically illustrated.

In an effort to enforce the disciplinary rules in federal prisons in accordance with due process requirements, more than 30,000 IDC hearings are held each year, and in almost half of these cases the sanction of disciplinary segregation is imposed. The meting out of punishment naturally produces resentment among those punished. As the Court has noted (*Wolff* v. *McDonnell*, 418 U.S. at 562), disciplinary proceedings take place against a background in which "[g]uards and inmates co-exist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment, and despair are commonplace." As a result, "[t]he reality is that disciplinary hearings and the imposition of disagreeable sanctions necessarily involve confrontations between inmates and authority * * *. Retaliation is much more than a theoretical possibility." *Ibid.* In some instances, the retaliatory urge is so great that physical force is used. If prisoners are empowered to strike out against IDC members by suing them personally for damages based upon alleged procedural defects in the disciplinary proceedings, "[s]uch suits could be expected with some frequency" (*Imbler* v. *Pachtman*, 424 U.S. at 425). The urge to turn the tables on prison officials—to make *them* the accused and to disrupt *their* personal lives—will frequently prove irresistible.[17]

The predictable result will be most unfortunate, not only for IDC members, but also for the prison system and the courts. Exposing IDC members to a civil suit for damages "would seriously cripple" (*Spalding* v. *Vilas*, 161 U.S. 483, 498 (1896)) the viability of the

[17] Moreover, since prisoners are generally barred by sovereign immunity from suing the United States or the Bureau of Prisons for damages, the IDC members will bear the full brunt of the prisoners' resentment.



prison dispute resolution system by threatening the freedom and independence of these decision makers. Only the most stalwart or foolhardy prison officials would willingly serve on IDCs. *Harlow*, 457 U.S. at 814; *Economou*, 438 U.S. at 509-510; *Ward* v. *Johnson*, 690 F.2d at 1108; *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1948), cert. denied, 339 U.S. 949 (1950); see *Taylor* v. *Kavanagh*, 640 F.2d 450 (2d Cir. 1981). And those who do serve would inevitably be influenced in their rulings by the threat of retaliatory lawsuits.

In defending the decision below, Judge Cudahy lightly dismissed these concerns by observing (App., *infra*, 15a) that IDC members "are accorded adequate protection against harassment by the enlarged safeguards of qualified immunity as announced in *Harlow*." Of course, this same argument could be made in an effort to show that judges should not be absolutely immune from damages liability. Unless protected by absolute immunity, however, judges would be swamped and demoralized by suits brought by disgruntled litigants, even if it appeared likely that all or most of those suits would ultimately be dismissed on qualified immunity grounds. The psychological burden, as well as the real economic effects, of defending against such suits would be considerable. The same is true for IDC members, who need and deserve the same protection if the prison disciplinary system is to continue in its present form.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1984

## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Nos. 82-1799, 82-1816

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DAVID SAXNER AND ALFRED CAIN, JR.,
PLAINTIFFS-APPELLEES, CROSS-APPELLANTS,

*v.*

CHARLES BENSON, ET AL.,
DEFENDANTS-APPELLANTS,
CROSS-APPELLEES.

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Argued June 3, 1983.
Decided Feb. 13, 1984.
Rehearing and Rehearing En Banc Denied June 8, 1984.

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Before WOOD and CUDAHY, *Circuit Judges*, and CELEBREZZE, *Senior Circuit Judge.**

HARLINGTON WOOD, JR., *Circuit Judge.*[1]

Originally the most important issue in this case was whether the members of the prison Institutional Disciplinary Committee were entitled to absolute immunity, not merely qualified immunity, from suits alleging the deprivation of a prisoner's constitutional rights. In the meantime, however, this court in *Redding* v. *Fairman*, 717 F.2d 1105, 1117 (7th Cir.1983), has resolved the immunity issue by adhereing [*sic*] to *Chavis* v. *Rowe*, 643

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* The Honorable Anthony J. Celebrezze, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

[1] The author acknowledges the substantial assistance of Judge Celebrezze to this opinion by contributing Section I.

F.2d 1281, 1288 (7th Cir.), *cert. denied*, 454 U.S. 907, 102 S.Ct. 415, 70 L.Ed.2d 225 (1981), and *Mary and Crystal* v. *Ramsden*, 635 F.2d 590 (7th Cir.1980), in finding no basis or justification for absolute immunity.[2]

The only remaining issues are whether or not the compensatory damages awarded by the jury and approved by the trial court are excessive, and whether the trial court erred in denying plaintiff's request for attorneys' fees under the Equal Access to Justice Act (28 U.S.C. § 2412).

I.

The defendants are senior correctional officers at the federal correctional institution at Terre Haute, Indiana. The plaintiffs, David Saxner and Alfred Cain, Jr., are former inmates of the institution. In 1975, the Terre Haute prison had a staff of 350 people; it housed nearly 2,000 inmates in its main facility and approximately 300 in its farm camp. In January, 1975 a prisoner died in the prison hospital under circumstances which were not entirely clear; shortly thereafter the prisoners engaged in a two day work stoppage to protest the inmate's death. The plaintiffs apparently did not participate in the work stoppage. Instead, they endeavored to discover the circumstances surrounding the prisoner's death and to report their findings to interested members of the press and public. Their efforts were partly responsible for an investigation of the prison's hospital and the resignation of the prison's physician.

[2] This panel, nevertheless, recognizes and respects the thoughtful contrary analysis advanced by Judge Celebrezze who dissents from the resolution of this issue. His arguments suggest that in due time the issue may merit reconsideration in this circuit. District Judge Dillon, the original district judge to consider this case, also agreed with the view that defendants were entitled to absolute immunity, but reconsidered and changed his holding following *Mary and Crystal* v. *Ramsden*, 635 F.2d 590.



On February 14, 1975, the plaintiffs were each charged with encouraging others to engage in another work stoppage, and they were confined to a section of the hospital being used as an administrative segregation unit. Saxner was notified of his right to a hearing, to be represented by a staff member of his choice, and to present testimony and documentary evidence; the record does not indicate that Cain ever received a copy of a similar notice.

The plaintiffs, who had remained in segregation, appeared before the Institutional Disciplinary Committee (IDC) on February 21, 1975. On that day, the IDC was composed of Theodore Cleavinger, an associate warden, Marvin Marcadis, a correctional supervisor, and Tom Lockett, chief of case management.[3]

At the hearing before the IDC, Saxner was represented by a staff counselor of his choice. After reading the charge against Saxner, the incident report was introduced, as well as three documents written by Saxner; no guards or inmates were called to testify,[4] but Saxner was permitted to introduce affidavits of several inmates, and to testify on his own behalf. At the close of evidence, the IDC found Saxner guilty of encouraging a work stoppage. The IDC also found Saxner guilty of two other offenses with which he had not been

[3] Generally, IDCs at Terre Haute were composed of three members. At least two of these members necessarily were senior correctional officers with a rank of department head level or higher. The third member was normally a less senior member of the correctional staff. Staff members who witnessed the incident were excluded from membership in the IDC, unless the incident was so widely witnessed that every staff member witnessed it. Also named in the complaint were Charles Benson, warden, and C.D. Wilson, administrative supervisor, who by reason of a directed verdict and a favorable jury verdict are no longer in the case.

[4] Saxner attempted to produce several inmates to testify; this testimony was excluded because it was considered cumulative.

charged: possession of contraband and unauthorized use of the mail.[5] The IDC ordered that Saxner be confined in administrative segregation for an indefinite period, and that he forfeit 84 days of good time; it also recommended that he be transferred to another institution.

Cain's hearing was held on the same day, before the same three correctional officers. Cain denied that he had encouraged others not to work and demanded an opportunity to examine his accuser. The IDC produced an incident report, which contained the particulars of the work stoppage charge, and two other documents which had been seized in an administrative search of his cell; no other evidence was produced. Cain was found guilty of the original work stoppage charge and of an additional charge of possession of contraband (the materials which had been seized in the search of his cell). The IDC ordered that Cain be confined in administrative segregation indefinitely, and that he forfeit 96 days of good time; the IDC also recommended that Cain be transferred to another institution.

Each plaintiff was informed of his right to appeal the IDC's decision, and both plaintiffs appealed the IDC's decision to the warden of the prison. The warden granted part of the relief sought by the plaintiffs on appeal: he restored the forfeited good time and ordered the plaintiffs' release from administrative segregation; the warden refused, however, to expunge their records. Both plaintiffs appealed to the Regional Office of the Bureau of Prisons; based upon the Regional Office's

[5] The basis for these charges, and the additional charges against Cain, were certain documents seized in the course of administrative searches of their cells. In Saxner's cell, a "press release" was found detailing the problems with the prison hospital; the document had been sent to fifty newspapers. Other documents of a similar nature were also seized. In Cain's cell, a letter detailing the need for a prison labor union was found.



recommendation, the records of both Cain and Saxner were expunged.

This action was commenced in March, 1975, while the plaintiffs were still in administrative segregation. The initial complaint was filed *pro se*. Subsequently, counsel was retained and the complaint was amended several times; the third amended complaint sought declaratory, injunctive, and monetary relief for alleged deprivations of the plaintiffs' first, fourth, fifth, sixth, and eighth amendment rights resulting from the hearings before the IDC in February 1975.

Prior to trial, the defendants moved for judgment on the pleadings, asserting that they were entitled to absolute immunity from liability for actions taken in their capacity as IDC members. Although the district court granted the motion, it held, on reconsideration, that the defendants were entitled only to qualified immunity in light of this court's decision in *Mary and Crystal* v. *Ramsden*, 635 F.2d 590. The case was tried to a jury in April, 1981; the jury found in response to special interrogatories, that all three of the IDC members had violated the plaintiffs' fifth amendment right to due process. The jury awarded each plaintiff $4,500 as compensatory damages.[6] In May, 1981 the defendants moved for judgment notwithstanding the verdict, arguing that the verdict was excessive; the motion was denied. The plaintiffs moved for an award of attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412; this motion was also denied. The defendants appeal, arguing that the IDC members are entitled to absolute immunity, an issue we have already addressed, and that the jury's verdict was excessive. The plaintiffs have cross-appealed, arguing that they are entitled to

[6] Each plaintiff was awarded $1,500 from each defendant; thus, each defendant was exposed to liability for $3,000 of the full damage award.

an award of attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412.

II.

The jury award of compensable damages in the amount of $4,500 to each plaintiff was found by the trial court, in ruling on defendants' motion for judgment notwithstanding the verdict, to be supported by sufficient evidence. The defendants find no fault with the jury instructions based on *Carey* v. *Piphus*, 435 U.S. 247, 262-64, 98 S.Ct. 1042, 1051-1052, 55 L.Ed.2d 252 (1978), claiming only that the amount was excessive.

Cain spent 35 days in segregation where he was confined almost 24 hours a day without access to the prison yard or other exercise facilities. He also lost various other privileges. Cain could not, while in segregation, earn good time, and his possible parole was affected. Saxner spent his first week in a windowless segregation cell in extremely unsanitary and repulsive conditions. He was not allowed out of that cell. For a few days he had no bedding, soap or adequate lighting. Later he was transferred to a different unit for two weeks.

The trial court credited plaintiffs' testimony to establish mental and emotional distress injuries attributable to the due process violations. The trial court found that the "anguish and frustration which flowed from the patent unfairness of the hearings and the fear that such unfair treatment would continue in the future in their administrative review and appeals, at their parole hearings, and in their day to day existence in the segregation units unrelated to the issue of the length (35 days) of time served in segregation" contributed to their actual injuries. The trial judge noted that nominal damages are all that are due upon a showing of a denial of due process without proof of actual damage, as injury cannot be presumed from denial of due process. *Carey* v. *Piphus*, 435 U.S. at 258, 98 S.Ct. at 1049. However, being convinced that plaintiffs had established "the link



between the due process violations and the actual injury consequences," the trial judge allowed the awards to stand.

The awards may be somewhat excessive, but so are the defendants' arguments which characterize plaintiffs' damages as "little more than a litany of diminished creature comforts combined with generalized claims of anxiety." In view of the general restrictions on appellate review of a jury's award of monetary damages, we will not substitute our judgment in these circumstances for that of the judge and jury who heard the testimony. Our own review of the evidence briefly summarized above satisfies us that "the trial judge did not abuse his discretion in finding 'nothing untoward, inordinate, unreasonable or outrageous—nothing indicative of a runaway jury or one that lost its head.'" *Gruenthal* v. *Long Island Railroad Co.*, 393 U.S. 156, 160, 89 S.Ct. 331, 334, 21 L.Ed.2d 309 (1968).

III.

Plaintiffs, as prevailing parties, claim they are entitled to an allowance of attorneys' fees under alternative theories.

During the time this suit was still pending in the district court on post-trial matters, the Equal Access to Justice Act, 28 U.S.C. § 2412, became effective on October 1, 1981. Although the Act broadened the liability of the government for attorneys' fees and expenses, it contained certain prerequisites. Sections 2412(b) and (d) limit this broadened attorneys' fees relief to actions "brought by or against the United States or any agency and any official of the United States acting in his or her official capacity." The trial judge disallowed the attorneys' fees because the United States was not named as a party defendant, nor were the defendants named as officials of the United States acting in their official capacities, although in fact they may have been so acting.

We agree with the district court. Plaintiffs do not satisfy the statutory requisites for attorneys' fees under the Act. The United States was not named, and the defendants were named only individually. In addition to the absence of any allegation that the defendants were acting in their official capacities, it is specifically alleged in paragraph 10 of the Third Amended Complaint, upon which the case was tried, that "All defendants are sued in their individual capacities." Plaintiffs would now have us remodel their complaint or give its allegations some subtle interpretation in variance with its plain language so as to qualify under the fees statute. The timing of this lawsuit and the enactment of the Equal Access to Justice Act may be unfortunate, but we cannot change those circumstances.

Plaintiffs alternatively claim to be entitled to an award of attorneys' fees under section 2414(b) of the Act, although plaintiffs concede that section also requires that the action meet the "official capacity" requirement. Plaintiffs urge that we read section 2412(b), permitting an award of attorneys' fees against the federal government to the same extent that fees may be awarded in cases involving "any other party," as opening the way for attorneys' fees through the Civil Rights Attorneys Fees Award Act, 42 U.S.C. § 1988. That Act provides for an award of fees in actions enforcing certain provisions of the Civil Rights Act, including 42 U.S.C. § 1983. After that argument brings us to section 1983, we are then urged to overlook section 1983's "acting under color of state law" requirement. The plaintiffs' claims here, they argue, are virtually identical to the usual section 1983 action so that attorneys' fees should be allowed under color of federal as well as



state law. That argument deserves credit for originality, but it is too original.[7]

Under the circumstances in this case we cannot send the government a judicial bill for plaintiffs' attorneys' fees.

The parties shall bear their own costs.

AFFIRMED.

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[7] It appears that in the district court plaintiffs argued an entitlement to fees upon a bad faith contention. *Hall* v. *Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973); *Alyeska Pipeline Company* v. *Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). The district court found the defendants' actions were not vexatious, wanton, or oppressive sufficient to require an award of attorneys' fees. Although that argument was not specifically advanced here, we would not disturb the trial judge's findings on the basis of this record.

CUDAHY, *Circuit Judge*, concurring.

I believe that *Redding* v. *Fairman*, 717 F.2d 1105 (7th Cir.1983), is entirely sound in its resolution of the issue of absolute immunity for a prison disciplinary committee. I must therefore, in view of the somewhat ambiguous tone of footnote 2 and in light of the dissent, respectfully indicate my support of *Redding* as an expression of the circuit position.[1] Any effort to analogize a trio of correctional officers conducting disciplinary proceedings in a prison to a "judge" or even to an administrative law judge, *see Butz* v. *Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), is unwarranted.

The activities and procedures of these prison officers are so dissimilar in form and substance from those of judges granted absolute immunity that reliance on an all-encompassing similarity of quasi-judicial function will not wash. As Chief Judge Winter has pointed out, performance of "quasi-judicial" functions does not automatically trigger absolute immunity. *Ward* v. *Johnson*, 690 F.2d 1098, 1115 (4th Cir.1982) (Winter, C.J., dissenting). Thus, in *Wood* v. *Strickland*, 420 U.S. 308, 320-21, 95 S.Ct. 992, 1000, 43 L.Ed.2d 214 (1975), school board members, who were sued for due process violations in disciplinary proceedings, were afforded

[1] I note that this circuit is not alone in its view that members of the Institutional Disciplinary Committee ("IDC") of a federal prison are not absolutely immune from damages for constitutional violations. In *Sihaad* [*sic*] v. *O'Brien*, 645 F.2d 556 (6th Cir.1981), the court rejected the same claim pressed by the defendants in this case, holding that IDC members are not "in one of 'those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business.'" *Id.* at 561 (quoting *Butz* v. *Economou*, 438 U.S. 478, 507, 98 S.Ct. 2894, 2911, 57 L.Ed.2d 895 (1978)).



only qualified immunity.[2] *See Ward* v. *Johnson*, 690 F.2d at 1115-16 (Winter, C.J., dissenting).[3] The prison disciplinary proceedings at issue here are certainly much more akin to the school board meeting in *Wood* than to a hearing conducted by an ALJ under the Administrative Procedure Act.

In any event, a comparison of this case with *Butz* shows how extraordinarily short the case before us falls of the standards prescribed in *Butz*. Among the characteristics of administrative law proceedings which the *Butz* court deemed significant were (1) the impartiality of the decisionmaking process and the reliability of the information developed; (2) the importance of precedent in resolving controversies; (3) the adversary nature of

[2] The dissent fails to recognize the importance of *Wood* v. *Strickland* to the proper resolution of this case. The functions performed by the *Wood* defendants were every bit as "judicial" as those of the defendants here, yet they received only qualified immunity. The dissent dismisses *Wood* (without actually naming it) by asserting that the IDC members cannot be compared to school board members. The dissent in this respect apparently discards the functional approach to immunity which it advocates elsewhere and instead apparently relies on the title of the officials and the context within which they operate. As is demonstrated below, quasi-judicial functions are performed by many executive officials, and only in the most extraordinary cases are they absolutely immune from damage liability. Whether an official's function and position in the government is far enough removed from the school board members in *Wood* to justify absolute immunity under *Butz* may be the key question in the case. I suspect that the Supreme Court went as far as it is willing to go with quasi-judicial immunity in *Butz* itself.

[3] The dissent's reliance on *Ward* v. *Johnson*, 690 F.2d 1098 (4th Cir.1982) is inappropriate since *Ward* was rejected in this circuit as not representing "the better view." *Redding*, 717 F.2d at 1117. In *Redding* this circuit endorsed the Sixth Circuit's view that federal disciplinary committee members have only qualified immunity from damage liability. *Id.*

the proceedings; and (4) the availability of review. *Butz* at 512-13, 98 S.Ct. at 2913-2914.

The *Butz* court relied on the Administrative Procedure Act and noted that "federal administrative law requires that agency adjudication contain many of the same safeguards as found in the judicial process...." *Id.* at 513, 98 S.Ct. at 2914. These protections include notice, representation by a lawyer, a verbatim transcript of the proceedings, subpoena power, presentation of oral and documentary evidence, cross-examination of adverse witnesses under oath (limited only by considerations of relevancy and materiality), rebuttal evidence and prehearing discovery. 5 U.S.C. §§ 554-57. The Act also provides for imposition of the burden of proof, findings and conclusions presented by the parties and ruled on by the hearing officer and a host of other procedural safeguards. The hearing officer may not also be involved in prosecutorial or investigative duties or be supervised by an employer interested in the case, and is subject to recusal for personal bias. The dissent fails to recognize the importance of these procedural safeguards, which were specifically relied upon by the *Butz* court and are almost all absent from IDC proceedings.

The disciplinary policy of the Bureau of Prisons provides few of the safeguards of the APA. The committee members are prison guards and supervisory employees who are in daily contact with the prisoners upon whom they sit in judgment. The committee members are supervisors and fellow employees of the guards who bring the charges and are in an unequal adversarial relationship with the prisoners. They are the keepers judging the kept rather than impartial adjudicators trained in law and presumably free of bias and prejudice. In addition, the information presented to the committee is frequently hearsay, self-serving and unreliable. *See Bracy* v. *Herringa*, 466 F.2d 702 (7th Cir.1972). Of course,



the decisions of the committee are not based on precedent since there is no recorded precedent. And review is restricted to agencies of the Bureau of Prisons. To suggest that the committee functions in any real respect like the administrative law judge in *Butz* is to depart from reality.

The suggestion that members of the prison disciplinary committees are entitled to absolute immunity also ignores a major premise of the entire immunity doctrine—that absolute immunity is the *rare exception* to the rule granting qualified immunity to public officials performing discretionary functions. *See Ward* v. *Johnson*, 690 F.2d 1098, 1114 (4th Cir.1982) (Winter, C.J., dissenting). *See also Nixon* v. *Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982) (most executive officials entitled only to qualified immunity); *accord Harlow* v. *Fitzgerald*, 457 U.S. 800, 814-15, 102 S.Ct. 2727, 2736-2737, 73 L.E.2d 396 (1982). Thus in *Wood* v. *Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975), school board members who were clearly performing quasi-judicial functions (a factor heavily relied upon by the dissent with respect to IDC members) were granted only qualified immunity from damage suits arising out of disciplinary meetings. This circuit, by rejecting the majority position in *Ward* v. *Johnson* as not representing the "better view" (*see Redding*, 717 F.2d at 1117), has clearly decided not to create another exception to the qualified immunity rule.

The dissent, by attempting to apply, perhaps mechanistically, the four factor *Butz* test, loses sight of the overriding concern the Supreme Court expressed in *Harlow* and *Butz*, that grants of absolute immunity are appropriate only when the defendant official establishes that *public policy* so requires.[4] *Harlow*, 457 U.S. at

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[4] The dissent, I believe, makes the error of presenting the question as implicating "the need to protect *officials* who perform judicial or quasi-judicial functions." *Infra* at 676-677 (em-

808, 102 S.Ct. at 2734; *Butz*, 438 U.S. at 506, 98 S.Ct. at 2910-2911. We said, in evaluating parole board members' claims to absolute immunity, that it should not be granted "absent compelling reasons." *United States ex rel. Powell* v. *Irving*, 684 F.2d 494, 495 (7th Cir.1982). No such reasons exist, nor have any been argued, for granting absolute immunity to prison disciplinary committees.

The dissent does not even attempt to justify absolute immunity here on policy grounds. Instead, it relies on a quite inappropriate functional test and a loose (at best) comparison with the responsibilities of the administrative law judges in *Butz*. But *Harlow* made clear that if public policy does not require absolute immunity, an official's function becomes irrelevant. The dissent makes no effort to explain why public policy requires absolute immunity for adjudicatory disciplinary proceedings in *prisons* but not in *schools*. Certainly, education is as vital to our society as punishment. In any event, if public policy does not require absolute immunity for the high ranking presidential aides in *Harlow*, it does not, by any stretch of the imagination, require absolute immunity for comparatively low ranking prison officials dispensing discipline.

It would be poor policy to extend absolute immunity to these defendants. The Supreme Court has recently charted a course which suggests a broadening of the protections of *qualified* immunity coupled with conferral of new grants of *absolute* immunity primarily upon defendants occupying a high place on the governmental ladder. Thus, in *Harlow* v. *Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the Court made it more difficult for plaintiffs to prevail over a defense of qualified immunity by eliminating any require-

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phasis supplied). The Supreme Court has made it clear that absolute immunity is granted only to protect the *public interest* and not the interests of the officials involved.



ment that the defendant show subjective good faith. *Cf. Egger* v. *Phillips*, 710 F.2d 292, 323 (7th Cir.1983) (*en banc*) (Cudahy, J., concurring). This makes it more likely that defendants will prevail on summary judgment, *Harlow*, 457 U.S. at 816, 102 S.Ct. at 2738, thus reducing the burden of, and the possible intimidation resulting from, litigation. And in *Nixon* v. *Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982), by extending absolute immunity to the President because of his high office, the Court indicated that the position an official occupies in the federal system may be relevant to the determination of what sort of immunity applies.[5] At least, the governmental rank of the official is relevant to the determination whether public policy requires absolute immunity. Here, of course, we are dealing with comparatively low-level officials whose duties are only quite incidentally "judicial" in any sense. And they are accorded adequate protection against harassment by the enlarged safeguards of qualified immunity as announced in *Harlow*.

Additionally, I note that the Supreme Court, in analyzing the issue of absolute immunity, has relied primarily upon the purposes of the post-Civil War amendments and of the Civil Rights Statutes. Thus, *Briscoe* v. *LaHue*, ___ U.S. ___, 103 S.Ct. 1108, 75 L.Ed.2d

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[5] The dissent notes, correctly, that the Supreme Court in *Nixon* v. *Fitzgerald* claimed reliance on the "special functions" doctrine. However, no mention is made in *Nixon* of presidential functions' necessitating absolute immunity. Instead, the Court relied on the President's "unique position in the constitutional scheme." *Id.*, 457 U.S. at 749, 102 S.Ct. at 2702. The dissent also suggests that in evaluating whether public policy requires absolute immunity, we are to look only at the function performed by the official in question. One need look no further than *Wood* v. *Strickland*, *supra*, to conclude that the dissent is incorrect in insisting that public policy uniformly dictates absolute immunity for those who perform judicial or quasi-judicial functions.

96 (1983), which confirmed the absolute immunity of police witnesses at trials, was based upon a searching analysis of the state common-law immunity immediately after the Civil War. Congress is presumed to have acted in the context of common law immunities. I doubt that such an inquiry into the purposes of the post-Civil War amendments and statutes, which the dissent does not attempt to undertake, could support absolute immunity for prison disciplinary committees since the 1871 Congress was greatly concerned about the proper functioning of the penal system.

I therefore concur fully in the majority opinion except for any possible implication of dissatisfaction with the refusal of this circuit to grant absolute immunity to prison institutional disciplinary committees.



CELEBREZZE, *Senior Circuit Judge*, dissenting.

The majority has failed to analyze the immunity issue presented by this case consistent with the Supreme Court's decision in *Butz* v. *Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). Respectfully, I dissent.

The Supreme Court in *Butz* established clearly that in some circumstances executive officials performing judicial or quasi-judicial functions are absolutely immune from liability for any tortious acts.[1] *Butz* v. *Economou*, 438 U.S. at 508-17, 98 S.Ct. at 2911-2912, 2916 (administrative law judge absolutely immune). For an official to demonstrate that he is entitled to absolute immunity

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[1] Normally, a prison official is entitled to qualified immunity from liability for acts occurring in the course of his duties. *Procunier* v. *Navarette*, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978). *See Butz* v. *Economou*, 438 U.S. 478, 498, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). The type of immunity to be accorded an official, however, is not a function of that official's position within the hierarchical structure of government. *Id.* at 511, 98 S.Ct. at 2913. Rather, the type of immunity to be accorded a particular official depends upon the duties the official was discharging at the time the allegedly tortious conduct occurred. *E.g.*, *Stump* v. *Sparkman*, 435 U.S. 349, 362, 98 S.Ct. 1099, 1107, 55 L.Ed.2d 331 (1978) (type of immunity available to a judge depends upon the nature of the act); *Hampton* v. *City of Chicago*, 484 F.2d 602, 608 (7th Cir.1973), *cert. denied*, 415 U.S. 917, 94 S.Ct. 1413, 39 L.Ed.2d 471 (1974) (nature of prosecutor's immunity depends upon character of conduct). *See Apton* v. *Wilson*, 506 F.2d 83, 91-92 (D.C.Cir.1974) (prosecutor absolutely immune only when participating in judicial process); *Lopez* v. *Vanderwater*, 620 F.2d 1229, 1233 (7th Cir.), *cert. dismissed*, 449 U.S. 1028, 101 S.Ct. 601, 66 L.Ed.2d 491 (1980) (judge absolutely immune if unconstitutional act is judicial in character).

for his acts, he must show: that his decisions are functionally comparable[2] to the type of decisions made by a

[2] The concurrence believes that the Supreme Court in *Nixon* v. *Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982), granted the President of the United States absolute immunity "because of his high office." According to the concurrence, the "rank of the official" determines whether public policy requires absolute immunity; it reasons that "if public policy does not require absolute immunity for the *high ranking* presidential aides in *Harlow*, it does not, by any stretch of the imagination, require absolute immunity for comparatively low ranking prison officials dispensing discipline" (emphasis added). Clearly, the concurrence's assertions that this dissent relies improperly on an official's "title" and disregards the "functional approach to immunity law" are unfounded.

Contrary to the concurrence's assertions, the Supreme Court has stated repeatedly that the type of immunity to be afforded executive officials *does not* depend upon the official's "high" position in the executive branch. *E.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 808-809, 102 S.Ct. 2727, 2733-2734, 73 L.Ed.2d 396 (1982); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 744-47, 102 S.Ct.2690, 2699-2700, 73 L.Ed.2d 349 (1982); *Butz* v. *Economou*, 438 U.S. 478, 506, 98 S.Ct. 2894, 2910, 57 L.Ed.2d 895 (1978). Instead, the Supreme Court has held consistently that the type of immunity available to executive officials depends upon the functions performed by the particular official claiming immunity. *E.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 810, 102 S.Ct. 2727, 2734, 73 L.Ed.2d 396 (1982); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 751, 102 S.Ct. 2690, 2702, 73 L.Ed.2d 349 (1982); *Butz* v. *Economou*, 438 U.S. 478, 508, 98 S.Ct. 2894, 2911-2912, 57 L.Ed.2d 895 (1978). Accordingly, the Supreme Court in *Nixon* did not grant the President of the United States absolute immunity "because of his high office." Instead, the Supreme Court reasoned that absolute immunity was necessary to permit the President to fulfill responsibilities important for the effective functioning of our government. Similarly, the Supreme Court in *Harlow* did not hold that "public policy does not require absolute immunity for . . . high ranking presidential aides." Indeed, the Supreme Court expressly *reserved* the question whether the petitioners, on remand, could prove that their functions were so sensitive as to justify a grant of absolute immunity. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 813, 102 S.Ct. 2727, 2736, 73 L.Ed.2d 396 (1982). I believe that the Supreme Court's decisions in *Butz*, *Nixon* and *Harlow* confirm the continued vitality of the "special functions" doctrine. Consistent with the Supreme Court's approach to immunity law, the critical inquiry does not depend upon the fact that this case involves "comparatively low-level officials", but rather, upon the functions which these officials were performing at the time that the alleged constitutional violation occurred.



judge, that the controversies which the official resolves are sufficiently intense to spawn harassing or intimidating litigation, and that the adjudicatory process over which the official presides contains sufficient safeguards to lessen the "need for individual suits to correct constitutional error." *Id.* at 512, 98 S.Ct. at 2914. Although several courts have applied the *Butz* analysis in a similar context, *e.g. Reed* v. *Village of Shorewood*, 704 F.2d 943, 951-52 (7th Cir.1983) (liquor control commissioner absolutely immune for quasi-judicial acts); *United States* v. *Irving*, 684 F.2d 494, 496-97 (7th Cir.1982) (parole board members absolutely immune for quasi-judicial acts); *Segarra* v. *McDade*, 706 F.2d 1301, 1305 (4th Cir.1983); *Ward* v. *Johnson*, 690 F.2d 1098 (4th Cir.1982) (en banc) (prison officials absolutely immune for quasi-judicial acts), one may not generalize safely from the holdings in those cases; every case differs in the degree which the official asserting absolute immunity is comparable to a judge, in the degree to which he is exposed to harassing litigation, and in the degree which the procedural formality of the proceeding is sufficient to assure that constitutional error, if it occurs, will not go uncorrected. Accordingly, each factor must be analyzed in the context of the facts and circumstances existing at the time the plaintiff's rights were infringed. Absent such analysis, a court cannot balance the need to protect the rights of citizens against the need to protect officials who perform judicial or quasi-judicial functions.[3]

[3] According to the concurrence, this dissent focuses improperly on protecting *officials*, rather than the *public interest*. The concurrence reasons that public policy is the threshold question;

I believe that this circuit has failed to analyze fully immunity issues concerning the special functions doctrine.[4] Without discussion, the majority holds that the federal correctional officers in this case are not entitled to absolute immunity; it believes that this court's decision in *Redding* v. *Fairman, et al.*, 717 F.2d 1105 (7th Cir.1983) is dispositive. Without discussion, this court in *Redding* held that prison officials of the Illinois Department of Corrections were not entitled to absolute immunity; it believed that this court's decision in *Mary and Crystal v. Ramsden*, 635 F.2d 590 (7th Cir. 1980)

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"if public policy does not require immunity, *an official's function becomes irrelevant*." (emphasis added).

As the concurrence recognizes, the critical question is whether public policy justifies conferring upon an official the right to absolute immunity. The concurrence fails to recognize, however, that we define the need for such protection by examining the *function* performed by the official. Quite logically, this approach has been called the "functional approach to immunity law." *E.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 810, 102 S.Ct. 2727, 2734, 73 L.Ed.2d 396 (1982). In other words, the importance of the function defines the public interest. In my view, the concurrence's suggestion that we first examine the public interest and if the interest is insufficient disregard the function performed by the official claiming immunity, is inconsistent with the basic rationale of the functional approach to immunity law. Whether the "functional test" established by the Supreme Court is an "inappropriate" approach to immunity law is not the issue. The issue in this circuit concerns this court's willingness to follow Supreme Court precedent.

[4] The exception is this court's decision in *United States* v. *Irving*, 684 F.2d 494 (7th Cir.1982). In *Irving*, the question presented was whether certain parole board members were entitled to absolute immunity. In an excellent discussion, this court found that the parole board members performed a task "functionally comparable" to judges, that the parole board members faced "the same risk of constant unfounded suits," and that the safeguards available protected adequately prisoners' parole rights. *Id.* at 496-97. Accordingly, this court held that these parole board members were entitled to absolute immunity. *Id.*



was dispositive. In *Mary and Crystal*, the primary issue was whether staff members at Goodland State Camp, a Wisconsin juvenile correctional institution, were entitled to absolute immunity. This court acknowledged that the threshold question was whether the staff members performed a function comparable to that of a judge; it concluded that the staff members of the juvenile center performed a function more akin to the function performed by school board members. *Id.* at 600. I do not believe that one can assert rationally that the function performed by the federal correctional officers in this case, who serve on a disciplinary committee in a federal penitentiary, is equivalent to the function performed by school board members.[5] The experience in this circuit demonstrates the need to analyze carefully each of the factors established by *Butz*.[6]

In this case, the defendants are federal correctional officers who serve on a committee called the Institutional Disciplinary Committee (IDC).[7] Although, as

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[5] The difference between the function performed by prison officials and the function performed by school board members is as great as the difference between prisoners and schoolchildren. *See Ingraham* v. *Wright*, 430 U.S. 651, 669, 97 S.Ct. 1401, 1411, 51 L.Ed.2d 711 (1977) ("The prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration.")

[6] For example, the question whether the available procedural safeguards are sufficient to assure that constitutional error will not go uncorrected depends on the particular procedures available. The procedural safeguards available to inmates who appear before the members of the IDC are not the same set of procedures available to juvenile inmates at a Wisconsin Juvenile Correctional Institution. *Mary and Crystal* v. *Ramsden*, 635 F.2d 590, 594 n.1 (7th Cir.1980) (juvenile defendants were not permitted to have advocates at the hearing, were not permitted to question witnesses, and were not permitted to produce witnesses in their defense).

[7] This circuit has twice concluded that prison officials involved in the disciplinary process were entitled to qualified im-

prison officials they were primarily responsible for the day-to-day operations of the prison, they argue that they were discharging a quasi-judicial function while serving on the IDC, and, thus, that they ought to be entitled to absolute immunity for these acts in light of *Butz* v. *Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). I agree.

Clearly, the appellants, as members of the IDC, are functionally comparable to judges. Indeed, IDC members are involved in the classic judicial function: they are required to determine whether an accused person is guilty or innocent of the charges brought against him. *See* Bureau of Prisons Policy Statement, 7400.5C (1974), Sec. 9(b). *See also* 28 C.F.R. Sec. 541.14(c). They are required to judge the credibility of witnesses, to weigh the evidence, and to make a principled determination of guilt or innocence. Because the IDC members discharge responsibilities which are identical to judges,[8] I believe that the first prong of the *Butz* test is satisfied. *See United States* v. *Irving*, 684 F.2d 494, 496-97 (7th Cir.1982) (parole board members are functionally comparable to judges). *Cf. Reed* v. *Village of Shorewood*, 704 F.2d 943, 951 (7th Cir.1983) (liquor control commissioner entitled to absolute immunity because acting in "judicial capacity").

munity. *Chavis* v. *Rowe*, 643 F.2d 1281 (7th Cir.1981); *Hayes* v. *Thompson*, 637 F.2d 483 (7th Cir.1980). In both of these cases, however, the question whether prison officials are entitled to absolute immunity does not appear to have been presented or decided; neither case cites or discusses the Supreme Court's decision in *Butz*.

[8] The justification for affording absolute immunity to executive officials who perform quasi-judicial functions is patently obvious. Like parole board members and federal court judges, officials who serve on a disciplinary committee in a federal penitentiary perform the function of rendering "impartial decisions in cases and controversies that excite strong feelings because the litigant's liberty is at stake. They face the same risk of constant unfounded suits by those disappointed by their decisions." *United States* v. *Irving*, 684 F.2d 494, 497 (7th Cir. 1982). ("The adjudicatory process simply could not work if the adjudicator had to anticipate a possible lawsuit from every dissatisfied litigant.").



The likelihood that an adverse decision would result in harassing or intimidating litigation is equally apparent. *Ward* v. *Johnson*, 690 F.2d 1098, 1108 (4th Cir.1982) (en banc). *See United States* v. *Irving*, 684 F.2d at 497 (danger that parole board members will be harassed by retaliatory suits). The ability of prisoners to generate litigation is substantial and well documented. *See Ward* v. *Johnson*, 690 F.2d at 1108. The burden of such prodigious litigation upon IDC members would be substantial in terms of time and money; these burdens are likely to affect the fashion in which IDC members discharge their quasi-judicial functions.

In my opinion, the final factor in *Butz*, whether the procedural safeguards are sufficiently formal to assure that constitutional error will not go uncorrected, is the crux of this dispute. *See Butz* v. *Economou*, 438 U.S. at 512, 98 S.Ct. at 2913-2914; *Reed* v. *Village of Shorewood*, 704 F.2d at 952. This factor is an expression of the inverse relationship between procedural regularity and the incremental deterrent effect of qualified immunity; if the formality of the procedure is sufficient to assure that constitutional error will be corrected, then qualified immunity will have only a marginal deterrent effect which, in turn, will not warrant exposing persons acting in a quasi-judicial function to the risk of personal liability and the expense of defending against the complaint of a disappointed litigant. *See Simons* v. *Bellinger*, 643 F.2d 774, 782 (D.C.Cir.1980) ("The presence of these checks reduces the need for private causes of action and thereby renders absolute immunity appropriate."). Thus, absolute immunity is justified only when the procedures afforded the litigants are sufficient to assure that the risk of uncorrected constitu-

tional error is low, and the attendant need for the incremental deterrent effect of qualified immunity is limited.

The procedures in effect at the time of the plaintiff's hearing before the IDC were fairly extensive.[9] Under Policy Statement 7400.5C, which was in effect in 1975, no staff member having personal knowledge of the incident which is the subject matter of a hearing is permitted to serve on the IDC. Policy Statement, 7400.5C, Sec. 9(a). *See* 28 C.F.R. Sec. 541.14(b). The IDC is required to keep a record of the proceedings which documents the inmate's awareness of his rights, the IDC's findings, its decision, the specific evidence relied upon by the IDC, and an explanation of the reasons for imposing the sanction chosen. Policy Statement 7400.5C, Sec. 9(c)(4). *See* 28 C.F.R. Sec. 541.15(g). Moreover, prisoners are entitled to seek review of the IDC's decision. Initial review of an IDC decision is provided by the warden; an adverse decision by the warden may be appealed to the Regional Director, Bureau of Prisons. Finally, decisions of the Regional Director may be reviewed by the Assistant Director (General Counsel), Bureau of Prisons. Policy Statement 7400.5C, Sec. 10. *See* 28 C.F.R. Sec. 541.17.

[9] The plaintiffs have argued that in order to determine whether the third part of the *Butz* analysis is satisfied, a court should examine the procedure that was *actually* afforded them. In my view, the degree of procedural formality must be determined by examining the procedural safeguards which *should* have been afforded the plaintiffs; if, as the plaintiffs suggest, courts examined only the procedure actually afforded, then the decision to provide absolute immunity would depend entirely upon the degree which the IDC departed from traditional notions of procedural regularity. In other words, if procedural error was egregious, absolute immunity would not be available as a defense. Such an analysis would be akin to a qualified immunity analysis because the availability of absolute immunity would depend upon the degree to which the defendant's actions departed from accepted standards of conduct. *Cf. Harlow* v. *Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (defense of qualified immunity unavailable if actions clearly are at variance with established constitutional right).



An inmate charged with misconduct is entitled to notice of all charges against him at least 24 hours before his hearing. Policy Statement, 7400.5C, Sec. 9(c)(1). *See* 28 C.F.R. Sec. 541.15(a). He also is entitled to select a correctional staff member as an advocate for his position; the IDC may order the hearing continued to assure that the selected advocate has sufficient time to prepare for the hearing. Policy Statement, 7400.5C, Sec. 9(c)(2). *See* 28 C.F.R. Sec. 541.15(b). An inmate is permitted to call witnesses and to present documentary evidence on his behalf; the staff representative may question these witnesses or, if the right to a staff representative is waived, the inmate may submit written questions to be asked by the IDC.[10] Policy Statement 7400.5C, Sec. 9(c)(3). *See* 28 C.F.R. Sec. 541.15(c). If the IDC refuses to call a witness requested by the inmate, the reasons for the refusal must be determined in the record. Policy Statement 7400.5C, Sec. 9(c)(3). *See* 28 C.F.R. Sec. 541.15(c). The inmate is entitled to be present during all phases of the hearing, except during the deliberations of the IDC. Policy Statement 7400.5C, Sec. 9(c)(5). *See* 28 C.F.R. Sec. 541.15(c).

The proceedings before the IDC are adversarial in nature and are sufficiently formal to assure that any constitutional error will either be corrected in the course of the proceeding, or avoided entirely. Inmates are represented by advocates, and are permitted to present evidence in their defense. The IDC is required to engage in principled decision making, to make de-

[10] This right to call witnesses is not unlimited; the IDC may refuse to call a witness if the testimony would be cumulative or if the presence of the witness would implicate security considerations. Policy Statement 7500.5C, Sec. 9(c)(3). In any event, inmates are not permitted to conduct any examinations of witnesses.

tailed findings of fact, and to explain the basis for its decision in writing. At least two of the members of the IDC must be senior officials holding a position equivalent to a department head position; thus, the IDC's decision is unlikely to be a result of intimidating influences. Finally, any decision is subject to several levels of appellate review; the efficiency of the review is demonstrated by the decision to modify, and, ultimately, to reverse the IDC's decision in this case. I believe that IDC proceedings are sufficiently formal to satisfy the third prong of the *Butz* test and to warrant the extension of absolute immunity to IDC members.

In sum, I believe that the IDC members act in a quasi-judicial fashion, that a substantial risk of retaliatory litigation exists, and that the procedural rules governing the conduct of disciplinary proceedings are sufficient to assure that constitutional error will not go uncorrected; consequently, I would hold that the appellants, all members of the IDC, are entitled to absolute immunity. *Butz* v. *Economou*, 438 U.S. at 511-512, 98 S.Ct. at 2913-2914.



**APPENDIX B**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

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Cause No. TH 75-47-C

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DAVID SAXNER, ET AL

*vs.*

CHARLES BENSON, ET AL

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**ORDER**

This matter is before the Court upon motion of the defendants, M. Marcadis, T.P. Lockett, and T.G. Cleavenger (the three Institutional Disciplinary Committee members (hereinafter "IDC")) for a judgment notwithstanding the verdict or in the alternative a motion for a new trial pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure.

On April 27, 1981, the jury returned verdicts for the plaintiffs, David Saxner and Alfred Cain, Jr. against the "IDC" members named above for violations of plaintiffs' Fifth Amendment rights to due process. The verdicts were based upon allegations that the plaintiffs were subjected to disciplinary proceedings in front of the "IDC" which did not meet the requirements of due process. (See, Court [*sic*] Three as to plaintiff Saxner, and Count Seven as to plaintiff Cain, of the Third Amended Complaint filed September 27, 1978). The plaintiffs were individually awarded compensatory damages in the sum of One Thousand Five Hundred Dollars ($1,500.00) from each of the three "IDC" member-defendants, which totaled Four Thousand Five Hundred Dollars ($4,500.00) to David Saxner and Four Thousand Five Hundred Dollars ($4,500.00) to Alfred Cain, Jr. The jury returned the other verdicts against the plaintiffs and for the various defendants. Judgment

was entered in accordance with the jury verdicts on April 28, 1981. The motion before the Court was filed May 7, 1981 and the same was timely filed.

Saxner and Cain alleged, and the facts adduced at trial support the jury verdict, that defendants Cleavinger, Marcadis, and Lockett, as members of the "IDC", subjected plaintiffs to inmate disciplinary proceedings inconsistent with procedural due process requirements. These requirements were initially set forth in *Wolff* v. *McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

The due process requirements for inmates accused of major rules violations consist of a hearing which complies with the following procedures:

1. Twenty-four (24) hour advanced written notice of the claimed violations;

2. An opportunity for the inmate to call witnesses and present documentary evidence in appropriate cases;

3. A written statement of the evidence relied upon and the reasons for any disciplinary action taken.

4. That the person who accuses him shall also not sit in judgment;

5. That the decision must be fundamentally fair, and not arbitrary and capricious.

*See Wolff, supra* at 563-572; *Baxter* v. *Paligiano*, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976); *Chavis* v. *Rowe*, 643 F.2d 1281 (7th Cir. 1981); *Hayes* v. *Thompson* (Hayes II), 637 F.2d 483 (7th Cir. 1980); *Hayes* v. *Walker* (Hayes I), 555 F.2d 625 (7th Cir. 1977), *cert. denied*, 434 U.S. 959, 98 S.Ct. 491, 54 L.ED.2d 320 (1977); *Shango* v. *Lurich*, 521 F. Supp. 1196 (N.D. Ill. 1981). These procedures were incorporated and in substantial effect during all times relevant to this action pursuant to Bureau of Prisons Policy Statement No. 7400.5C, paragraph 9(c), (October 4, 1974) entitled "Inmate Discipline." (See plaintiff's exhibit 7, pp 10-12). The Court instructed on the due process guarantees in Final Instruction Number 12.



At trial, the evidence indicated that Mr. Saxner and Mr. Cain received incident reports on February 15, 1979 charging them individually with "encouraging others to refuse to work." The plaintiffs appeared before the "IDC" on February 21, 1975. The committee consisted of defendants Cleavinger, Marcadis, and Lockett. During the hearing on the work stoppage charge, plaintiffs faced additional charges to which they did not receive advance notice. Plaintiff Saxner was charged at the hearing on February twenty-first and found responsible for unauthorized use of the mail and possession of contraband. Plaintiff Cain was charged and found responsible without receipt of advanced notice for possession of contraband.

The failure to give advance notice of these charges commenced the snowball of procedural due process deficiencies in the February twenty-first hearing. In addition to the lack of written notice, the inmates failed to have an opportunity to call witnesses and prepare evidence in defense of the charge. There was evidence in the record for the jury to likewise find due process deficiencies in the hearing on the work stoppage charge to which advance written notice had been given.

The right to call witnesses in the context of this case case has been noted as a "limited right." *Baxter*, 425 U.S. at 321. The Seventh Circuit initially addressed this issue in Hayes I indicating that to meet procedural due process guarantees in prison disciplinary hearings required: (1) "some support" for the denial of a request for witnesses appearing in the record and (2) the committee stating the "essential facts" upon which it based its decision. *Hayes*, 555 F.2d at 630, 633. The evidence presented to the jury sufficiently supports a basis for the jury verdict finding procedural due process violations in the February twenty-first "IDC" hearing.

This Court is well aware of the Supreme Court's admonition that the judiciary "should not be too ready to exercise oversight and put aside the judgment of prison administrators," especialy since "the operation of a correctional institution is at best an extraordinarily difficult undertaking." *Wolff*, 418 U.S. at 566, 94 S.Ct. at 2980. However, given the relatively recent *Wolff* requirements at the time of the hearing in question, as incorporated through the Bureau of Prisons policy, the individual "IDC" members failed to meet bare due process guarantees despite broad discretionary latitude. As to Saxner and Benson, neither had an opportunity to prepare or properly respond to charges they had not received notice to nor was there a proper showing of the compelling reasons for not calling witnesses to any of the charges.

For the violations of due process in the "IDC" hearing on February twenty-first (See Final Instructions 11, 12, 13 and 14) the jury awarded damages totaling Four Thousand Five Hundred Dollars ($4,500.00) to each plaintiff. A good faith instruction was given (See Final Instruction 31). Instruction numbers 33 and 34 explained in part the awarding of damages. Specifically, instruction number 34 allowed actual or compensable damages for a due process violation only upon a finding of actual physical or mental injury. The jury had sufficient evidence and found that the plaintiffs suffered actual injury from denial of due process rights as indicated in the answer to the interrogatories submitted to the jury along with the verdict forms.

The defendants argue that there cannot be a recovery for actual or compensable damages on the due process violations since there allegedly was no jury finding of physical or mental injury suffered by plaintiffs due to the answers to the special interrogatory forms reflecting no other violations of plaintiffs' constitutional rights. The special interrogatory forms did not set out



due process violation particulars for the jury to answer through their finding a Fifth Amendment violation in the "IDC" hearing. (The defendants did not propose additional particulars to the verdict forms. *See*, *Furtado* v. *Bishop*, 604 F.2d 80 (1st Cir. 1979)). More than one due process violation is possible. Did the jury find that the due process violations applied to the work stoppage charges as well as the other charges? The answer to this question does not require a new trial or setting aside the damage finding.

Plaintiffs Saxner and Cain asserted (see Counts 3 and 7) and established at trial, injury including mental and emotional distress resulting from and directly attributable to denial of due process rights to which the Supreme Court has held that plaintiffs may recover compensable damages. *Carey* v. *Piphus*, 435 U.S. 247, 263-264, 98 S.Ct. 1042, 55 L.Ed. 2d 252 (1978). *See Chavis*, *supra*; *Hayes* v. *Thompson*, 637 F.2d 483, 494 (7th Cir. 1980) (Hayes II) (Swygert, J. dissenting); *Shango*, *supra*. Both plaintiffs testified to their emotions of mental pain, anguish, and frustration which flowed from the patent unfairness of the hearings and the fear that such unfair treatment would continue in the future in their administrative review and appeals, at their parole hearings, and in their day to day existence in the segregation units unrelated to the issue of the length (35 days) of time served in segregation.

This Court is not inclined to award compensatory damages for a mere general allegation of mental distress. *See Perez* v. *Rodriguez Bou*, 575 F.2d 21, 25 (1st Cir. 1978). The defendants are arguing that nominal damages are, at best, what plaintiffs are entitled to. Nominal damages are proper upon a showing of a denial of due process without proof of actual damage. *Carey* v. *Piphus*, 435 U.S. 247 (1978). Injury cannot be presumed from a denial of due process, 435 U.S. at 258. The Court is convinced the evidence at trial did not re-

quire the jury to make such an assumption in assessing its compensatory damages and that the plaintiffs proved the link between the due process violations and the actual injury consequences. *See McGhee* v. *Draper*, 639 F.2d 639, 645 (10th Cir. 1981).

Emotions are intangible but they are none the less perceptible. The emotional distress in this case was aggravated by the circumstances of the "IDC" hearing. The hurt done to feelings and to expectations of plaintiffs by an invasion of constitutional rights is no less real and no less compensable than the cost of repairing broken or damaged property in other cases. *See generally Kincaid* v. *Rusk*, Slip Op. No. 78-1822 decided February 10, 1982 (7th Cir. 1982); *Buise* v. *Hudkins*, 584 F.2d 223 (7th Cir. 1978), *cert. denied*, 440 U.S. 916 (1979). Even in a prison "IDC" hearing, the "touchstone of due process is protection of the individual against arbitrary action of government." *Wolff* v. *McDonnell*, 418 U.S. at 558, 94 S.Ct. at 2976. Wounded psyche and soul are to be salved by damages, when actually proven, as much as payment for property damage replacement or repair.

The difficulty of fixing a compensatory dollar amount is well-known. This axiom does not require nominal damages, however. *See Buise, supra; Mack* v. *Johnson*, 430 F. Supp. 1139, 1150-1151 (E.D. Pa. 1977), *see also, Brule* v. *Southworth*, 611 F.2d 406, 411 (1st. Cir. 1979). The Second Circuit has upheld a jury verdict ($1,000.00) as not being excessive on facts similar to the ones at bar. *United States ex. rel. Larkins* v. *Oswald*, 510 F.2d 583 (2nd Cir. 1975). The Seventh Circuit has likewise upheld a jury award of more than nominal damages for constitutional deprivations of due process perpetrated by members of a sheriffs department. *Konczak* v. *Tyrrell*, 603 F.2d 13 (7th Cir. 1979).

The Court is not persuaded by the claim that plaintiffs' [*sic*] may not recover substantial damages despite



due process violations where plaintiffs may have been disciplined in a similar manner had they been afforded their due process guarantees. *Carey, supra*, at 266-67. The jury as fact-finder, had this evidence as well as other facts for their consideration. The introduction of plaintiff Saxner's wife and child during closing argument did not have a prejudicial impact upon any jury determination of damages to justify reduction of damages or to justify a new trial given the Court's instruction at the time.

Upon this review, a motion for judgment notwithstanding the verdict "should be denied where the evidence, along with the inferences to be reasonably drawn therefrom, when viewed in the light most favorable to the party opposing such motion is such that reasonable men [or women] in a fair and impartial exercise of their judgment may reach different conclusions." *Clemons* v. *Mitsui O.S.K. Lines, Ltd.*, 596 F.2d 746, 748 (7th Cir. 1979); *Hohmann* v. *Packard Instrument Co.*, 471 F.2d 815, 819 (7th Cir. 1973). Making all reasonable inferences in the light most favorable to the jury's verdict, the Court believes the evidence at trial established sufficient evidence of due process violations resulting in actual injury compensable in the sums found by the jury.

Defendants further move for a new trial. A verdict may be set aside and a new trial granted when the verdict is contrary to the clear weight of the evidence, or whenever in the exercise of sound discretion the trial judge thinks this action is necessary to prevent a miscarriage of justice. *See United States for use of Weyerhaeuser Company* v. *Bucon Construction Company*, 430 F.2d 420, 14 F.R. Serv. 2d 278 (5th Cir. 1970); 6A *Moore's Federal Practice*, ¶ 59.08[5], pp. 59-154 through 155 (1979). In this case, the Court concludes that the verdict is not against the clear weight of the evidence. Accordingly, no new trial will be ordered.

By reason of the foregoing, the Court concludes:

(1) defendants' motion for judgment notwithstanding the verdict is DENIED;

(2) Defendants' alternative motion for a new trial is DENIED.

IT IS SO ORDERED.

Dated at Evansville, Indiana this 14th day of April, 1982.

/s/ Gene E. Brooks

JUDGE GENE E. BROOKS
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA



**APPENDIX C**

## UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Nos. 82-1799 and 82-1816

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DAVID SAXNER AND ALFRED CAIN, JR.,
PLAINTIFFS-APPELLEES, CROSS-APPELLANTS

*vs.*

CHARLES BENSON, ET AL.,
DEFENDANTS-APPELLANTS, CROSS-APPELLEES.

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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, TERRE HAUTE DIVISION

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[Feb. 13, 1984]

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BEFORE: HARLINGTON WOOD, JR., *Circuit Judge*
RICHARD D. CUDAHY, *Circuit Judge*
ANTHONY J. CELEBREZZE, *Senior Circuit Judge**

This cause was heard on the record from the United States District Court for the Southern District of Indiana, Terre Haute Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with the parties to bear their own costs on appeal, in accordance with the opinion of this Court filed this date.

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* The Honorable Anthony J. Celebrezze, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

**APPENDIX D**

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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Nos. 82-1799 and 82-1816

---

DAVID SAXNER AND ALFRED CAIN, JR.,
PLAINTIFFS-APPELLEES, CROSS-APPELLANTS,

*vs.*

CHARLES BENSON, ET AL.,
DEFENDANTS-APPELLANTS, CROSS-APPELLEES.

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APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF INDIANA,
TERRE HAUTE DIVISION

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[June 8, 1984]

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**ORDER**

BEFORE: HARLINGTON WOOD, JR., *Circuit Judge*
RICHARD D. CUDAHY, *Circuit Judge*
ANTHONY J. CELEBREZZE, *Senior Circuit Judge**

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by counsel for the defendants-appellants, a vote of the active members of the Court was requested, and a majority of the active members of the Court have voted to deny a rehearing *en banc*.** A majority of the judges on the original panel have voted to deny the petition for rehearing.*** Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Anthony J. Celebrezze, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

** Judges Pell, Eschbach, Posner, and Coffey voted to grant a rehearing *en banc*.

*** Judge Celebrezze voted to grant the petition for rehearing. He did not participate in the vote on rehearing *en banc*.



**APPENDIX E**

28 C.F.R. 541.14—541.19 provides in pertinent part:

**§ 541.14 Incident report and investigation.**

(a) *Incident Report.* The Bureau of Prisons encourages informal resolution (requiring consent of both parties) of incidents involving violations of Bureau regulations. However, when staff witnesses or has a reasonable belief that a violaton of Bureau regulations has been committed by an inmate, and when staff considers informal resolution of the incident inappropriate or unsuccessful, staff shall prepare an Incident Report and promptly forward it to the appropriate correctional supervisor. Except for prohibited acts in the Greatest Severity Category, the correctional supervisor may informally dispose of the Incident Report or forward the Incident Report for investigtion consistent with this section. The correctional supervisor shall expunge the inmate's file of the Incident Report if informal resolution is accomplished. Only the IDC may make a final disposition on a prohibited act in the Greatest Severity Category.

(b) *Investigation.* Staff shall conduct the investigation promptly unless circumstances beyond the control of the investigator intervene. The investigating officer should be an employee of supervisory level and may not be the employee reporting the incident, or one who was involved in the incident, in question.

(1) When it appears likely that the incident may be the subject of criminal prosecution, the investigating officer shall suspend the investigation, and staff may not question the inmate until the Federal Bureau of Investigation or other investigative agency interviews have been completed or until the agency responsible for the criminal investigation advises that staff questioning may occur.

(2) The inmate may receive a copy of the Incident Report prior to being seen by the investigating agency. The investigating officer (Bureau of

Prisons) shall give the inmate a copy of the Incident Report at the beginning of the investigation, unless there is good cause for delivery at a later date, such as absence of the inmate from the institution or a medical condition which argues against delivery. If the investigation is delayed for any reason, any employee may deliver the charge(s) to the inmate. The staff member shall note the date and time the inmate received a copy of the Incident Report. The investigator shall also read the charge(s) to the inmate and ask for the inmate's statement concerning the incident unless it appears likely that the incident may be the subject of criminal prosecution. The investigator shall advise the inmate of the right to remain silent at all stages of the disciplinary process but that the inmate's silence may be used to draw an adverse inference against the inmate at any stage of the institutional disciplinary process. The investigator shall also inform the inmate that the inmate's silence alone may not be used to support a finding that the inmate has committed a prohibited act. The investigator shall then thoroughly investigate the incident. The investigator shall record all steps and actions taken on the Incident Report and forward all relevant material to the staff holding the initial hearing. The inmate does not receive a copy of the investigation. However, if the case is ultimately forwarded to the Institution Discipline Committee, the Committee shall give a copy of the investigation and other relevant materials to the inmate's staff representative for use in presentation on the inmate's behalf.

[47 FR 35926, Aug. 17, 1982; 47 FR 39676, Sept. 9, 1982]

**§ 541.15 Initial hearing.**

The Warden shall delegate to one or more institution staff members the authority and duty to hold an initial hearing upon completion of the in-



vestigation. The Warden shall authorize these staff members to impose minor sanctions (G through P) for violation of prohibited act(s). In order to insure impartiality, the appropriate staff member(s) (hereinafter usually referred to as the Unit Discipline Committee (UDC)) may not be the reporting or investigating officer or a witness to the incident. However, a staff member witnessing an incident may serve on the UDC where virtually every staff member in the institution witnesses the incident in whole or in part. If the UDC finds at the initial hearing that an inmate has committed a prohibited act, the UDC may impose minor dispositions and sanctions. When an alleged violation of Bureau rules is serious and warrants consideration for other than minor sanctions, the UDC shall refer the charges to the Institution Discipline Committee for further hearings. The UDC must refer all greatest category charges to the IDC. The following minimum standards apply to initial hearings in all institutions.

(a) Staff shall give each inmate charged with violating a Bureau rule a written copy of the charge(s) against the inmate within 24 hours of the time staff became aware of the inmate's involvement in the incident.

(b) Each inmate so charged is entitled to an initial hearing before the UDC, ordinarily held within two work days (excluding day of notice, weekends and holidays) of the time staff became aware of the inmate's involvement in the incident to consider the charge(s) brought against the inmate.

(c) The inmate is entitled to be present at the initial hearing except during deliberations of the decision maker(s) or when institutional security would be joepardized by the inmate's presence. The UDC shall clearly document in the record of the hearing reasons for excluding an inmate from the hearing. An inmate may waive the right to be present at this hearing, provided that the waiver is

documented by staff and reviewed by the UDC. A waiver may be in writing, signed by the inmate, or if the inmate refuses to sign a waiver, it may be shown by a memorandum signed by staff and witnessed by a second staff member indicating the inmate's refusal to appear at the hearing. The UDC may conduct a hearing in the absence of an inmate when the inmate waives the right to appear. When an inmate escapes or is otherwise absent from custody, the UDC shall conduct a hearing in the inmate's absence at the institution in which the inmate was last confined.

(d) The inmate is entitled to make a statement and to present documentary evidence in the inmate's own behalf.

(e) The Unit Discipline Committee may informally resolve any High, Moderate, or Low Moderate charge. The UDC shall expunge the inmate's file of the Incident Report if informal resolution is accomplished.

(f) The Unit Discipline Committee shall consider all evidence presented at the hearing and shall make a decision in accordance with the greater weight of the evidence and one which is supported by substantial evidence manifested in the record of the proceedings. The UDC shall take one of the following actions:

(1) Find that the inmate committed the prohibited act charged and/or a similar prohibited act if reflected in the Incident Report;

(2) Find that the inmate did not commit the prohibited act charged or a similar prohibited act if reflected in the Incident Report; or

(3) Refer the case to the IDC for further hearing.

The UDC shall give the inmate a written copy of the decision and disposition by the close of business the next work day. Any action taken as a minor disposition is reviewable under the Administrative Remedy Procedure (see Part 542 of this chapter).



(g) The UDC shall prepare a record of its proceedings which need not be verbatim. A record of the hearing and supporting documents are kept in the inmate's file.

(h) When the alleged violation of Bureau rules is serious and warrants consideration for other than minor sanctions (G through P), the UDC shall refer the charge(s) without indication of findings as to commission of the alleged violation to the Institution Discipline Committee (IDC) for hearing and disposition. The UDC shall forward copies of all relevant documents to the chairman of the IDC with a brief statement of reasons for the referral along with any recommendations for appropriate disposition if the IDC finds the inmate has committed the act charged and/or a similar prohibited act. The inmate whose charge is being referred to the Institution Discipline Committee may be retained in administrative detention or other restricted status, but the UDC may not impose a final disposition if the matter is being referred to the IDC.

(i) When charges are to be referred to the Institution Discipline Committee, the UDC shall advise the inmate of the rights afforded at a hearing before the IDC. The UDC shall ask the inmate to indicate a choice of staff representative, if any, and the names of any witnesses the inmate wishes to be called to testify at the hearing and what testimony they are expected to provide. The UDC shall advise the inmate that the inmate may waive the right to be present at the IDC hearing, but still elect to have witnesses and/or a staff representative appear in the inmate's behalf at this hearing.

(j) When the Unit Discipline Committee holds a full hearing and determines that the inmate did not commit a prohibited act of High, Moderate or Low Moderate Severity, the UDC shall expunge the inmate's file of the Incident Report and related documents. The UDC must refer to the Institution Dis-

cipline Committee all incidents involving prohibited acts of Greatest Severity.

(k) The UDC may extend time limits imposed in this section for a good cause shown by the inmate or staff and documented in the record of the hearing.

[47 FR 35926, Aug. 17, 1982; 47 FR 39676, Sept. 9, 1982]

**§ 541.16 Establishment and functioning of Institution Discipline Committee.**

(a) The Warden shall establish a single Institution Discipline Committee. In the event of a serious disturbance or other emergency, or if an inmate commits an offense in the presence of the IDC, the Warden may establish more than one Institution Discipline Committee with approval of the appropriate Regional Director.

(b) The Warden may appoint as many members to the Institution Discipline Committee as are appropriate. At least three members, including the chairman, shall be present at any hearing to constitute a quorum. The chairman and at least one member present at the hearing must be of the department head level or higher. The third member and additional members of the Committee need not be of department head level. For the purpose of this section, "department head" includes acting department head. In order to insure impartiality, no member of the IDC may be the reporting officer, investigating officer, or UDC member or a witness to the incident, or play any significant part in having the charge(s) referred to the IDC. However, a staff member witnessing an incident may sit as a member of the IDC where virtually every staff member in the institution witnessed the incident in whole or in part.

(c) The Institution Discipline Committeee shall conduct hearings, make findings, and impose appropriate sanctions for incidents of inmate misconduct referred to it for disposition following the hearing required by § 541.15 before the UDC. The IDC may not hear any case or impose any sanctions in a case not heard and referred by the UDC. Only the Institution Discipline Committee shall have the authority to impose or suspend sanctions A through F. This Committee shall conduct reviews of inmates placed in disciplinary segregation in accordance with the requirements of § 541.20.



**§ 541.17 Procedures in Institution Discipline Committee hearings.**

The Institution Discipline Committee shall proceed as follows:

(a) The Warden shall give an inmate advance written notice of the charge(s) against the inmate no less than 24 hours before the inmate's appearance before the Institution Discipline Committee unless the inmate is to be released from custody within that time. An inmate may waive in writing the 24-hour notice requirement.

(b) The Warden shall provide an inmate the service of a full time staff member to represent the inmate at the hearing before the Institution Discipline Committee should the inmate so desire. The warden, the members of the IDC, the reporting officer, investigating officer, a witness to the incident, and UDC members involved in the case may not act as staff repesentative. The Warden may exclude other staff from acting as staff representative in a particular case when there is a potential conflict in roles. The staff representative shall be available to assist the inmate if the inmate desires by speaking to witnesses and by presenting favorable evidence to the IDC on the merits of the charge(s) or in extenuation or mitigation of the charge(s). The chairman shall arrange for the presence of the staff representative selected by the inmate. If the staff member selected declines or is unavailable because of absence from the institution, the inmate has the option of selecting another

representative, or in the case of an absent staff member of waiting a reasonable period for the staff member's return, or of proceeding without a staff representative. When several staff members decline this role, the Warden shall promptly appoint a staff representative to assist the inmate. The IDC shall afford a staff representative adequate time to speak with the inmate and interview requested witnesses where appropriate. While it is expected that a staff member will have had ample time to prepare prior to the hearing, delays in the hearing to allow for adequate preparation may be ordered by the chairman of the Institution Discipline Committee.

When it apears that the inmate is not able to properly make a presentation on his own behalf (for example, an illiterate inmate), the Warden shall appoint a staff representative for that inmate, even if one is not requested.

(c) The inmate is entitled to make a statement and to present documentary evidence in the inmate's own behalf. An inmate has the right to submit names of requested witnesses and have them called to testify and to present documents in the inmate's behalf, provided the calling of witnesses or the disclosure of documentary evidence does not jeopardize or threaten institutional or an individual's security. The chairman shall call those witnesses who have information directly relevant to the charge(s) and who are reasonably available. This may include witnesses from outside of the institution. The inmate charged may be excluded during the appearance of the outside witness. The appearance of the outside witness should be in an area of the institution in which outside visitors are usually allowed. The chairman need not call repetitive witnesses. The reporting officer and other adverse witnesses need not be called if their knowledge of the incident is adequately summarized in the Incident Report and other investigative mate-



rials supplied to the IDC. The chairman shall request submission of written statements from unavailable witnesses when necessary for an appreciation of the circumstances surrounding the charge(s). The chairman shall document reasons for declining to call requested witnesses in the IDC report. The inmates's staff representative, or when the inmate waives staff representation members of the Committee, shall question witnesses requested by the inmate who are called before the IDC. The inmate who has waived staff representation may submit questions for requested witnesses in writing to the Committee. The inmate may not question any witness at the hearing.

(d) An inmate has the right to be present throughout the Institution Discipline Committee hearing except during deliberations of the Committee or when institutional security would be jeopardized. The chairman must document in the record the reason(s) for excluding an inmate from the hearing. An inmate may waive the right to be present at the hearing, provided that the waiver is documented by staff and reviewed by the IDC. A waiver may be in writing, signed by the inmate, or if the inmate refuses to sign a waiver, it may be shown by a memorandum signed by staff and witnessed by a second staff member indicating the inmate's refusal to appear at the hearing. The Committee may conduct a hearing in the absence of an inmate when the inmate waives the right to appear. When an inmate escapes or is otherwise absent from custody, the Institution Discipline Committee shall conduct a hearing in the inmate's absence at the institution in which the inmate was last confined. When an inmate who has had any sanctions imposed by the IDC while absent from custody returns to custody, the Warden shall have the charges reheard before the Institution Discipline Committee at the institution to which the inmate is designated after return to custody, and fol-

lowing appearance before the Unit Discipline Committee at that institution. The UDC shall ensure that the inmate has all rights required for appearance at the Institution Discipline Committee, including delivery of charge(s), advisement of the right to remain silent and other rights to be exercised at the IDC. All the applicable procedural requirements of Institution Discipline Committee hearings apply to this rehearing, except that written statements of witnesses not readily available may be liberally used instead of in-person witnesses. The IDC upon rehearing may dismiss the charge(s), or may modify but may not increase the sanctions previously imposed in the inmate's absence.

(e) The IDC may postpone or, at any time prior to making a decision as to whether or not a prohibited act was committed, may continue the hearing until a later date whenever further investigation or more evidence is needed. A postponement or continuance must be for good cause (determined by the IDC chairman) shown by the inmate or staff and should be documented in the record of the hearing.

(f) The IDC shall consider all evidence presented at the hearing and shall make a decision in accordance with the greater weight of the evidence and one which is supported by substantial evidence manifested in the record of the proceedings. The Committee shall find that the inmate either:

(1) Committed the prohibited act charged and/or a similar prohibited act if reflected in the Incident Report, or

(2) Did not commit the prohibited act charged or a similar prohibited act if reflected in the Incident Report.

When a disciplinary committee decision is based on confidential informant information, the UDC or IDC shall document, ordinarily in the committee report, its finding as to the reliability of each confi-



dential informant relied on *and the factual basis for that finding.* When it appears that this documentation in the committee report would reveal the confidential informant's identity, the finding as to the reliability of each confidential informant relied on and the factual basis for that finding shall be made part of the hearing record in a separate report, prepared by the IDC chairman, not available to the inmate.

(g) The Institution Discipline Committee shall prpeare a record of its proceedings which need not be verbatim. This record mut be sufficient to document the advisement of inmate rights, the Committee's findings, the Committee's decision and the specific evidence relied on by the Committee, and must include a brief statement of the reasons for the sanctions imposed. The evidence relied upon, the decision, and the reasons for the actions taken must be set out in specific terms unless doing so would jeopardize institutional security. The IDC shall give the inmate a written copy of the decision and disposition.

(h) A record of the hearing and supporting documents are to be kept in the inmate central file.

(i) The Institution Discipline Committee shall expunge an inmate's file of the Incident Report and related documents whenever the Committee finds the inmate did not commit a prohibited act. The requirement for expunging the inmate's file does not preclude maintaining for research purposes copies of disciplinary actions resulting in "not guilty" findings in a master file separate from the inmate's institution file. However, institution staff may not use or allow the usage of the contents of this master file in a manner which would adversely affect the inmate. Likewise, the expungement requirement does not require the destruction of medical reports or other reports relating to a particular inmate which must be maintained to document medical or other treatment given in a special housing

unit. If an inmate's conduct during one continuous incident may constitute more than one prohibited act, and if the incident is reported in a single Incident Report, and if the IDC finds the inmate has not committed every prohibited act charged, then the IDC shall record its findings clearly and shall mark out on the Incident Report the incident and code references to charges which were not proved. Institution staff may not use the existence of charged but unproved misconduct against the inmate.

[47 FR 35926, Aug. 17, 1982; 47 FR 39676, Sept. 9, 1982]

**§ 541.18 Dispositions of the Institution Discipline Committee.**

The Institution Discipline Committee has available a broad range of sanctions and dispositions when it has completed a hearing. The Institution Discipline Committee may do any of the following:

(a) Dismiss any charge(s) before it upon a finding that the inmate did not commit the prohibited act(s). The IDC shall order the record of charge(s) expunged upon such finding.

(b) Impose sanctions A through P as provided in § 541.13.

(c) Suspend the execution of a sanction it imposes as provided in § 541.13.

**§ 541.19 Appeals from Unit Discipline Committee on Institution Discipline Committee actions.**

At the time the Unit Discipline Committee or Institution Discipline Committee gives an inmate notice of its decision, they shall also advise the inmate that the inmate may appeal the decision under Administrative Remedy Procedures (see Part 542 of this chapter). On appeals, the Warden, Regional Director, or General Counsel may approve, modify, reverse, or send back with directions any disciplinary action of the unit discipline committee or Institution Discipline Committee but may not increase the sanctions imposed. On appeals, the Warden, Regional Director, or General Counsel shall consider:



(a) Whether the Unit Discipline Committee or the Institution Discipline Committee substantially complied with the regulations on inmate discipline;

(b) Whether the Unit Discipline Committee or Institution Discipline Committee based its decision on substantial evidence; and

(c) Whether an appropriate sancton was imposed according to the severity level of the Prohibited Act.

Bureau of Prisons Policy Statement 7400.5C, issued Oct. 4, 1974, provided in pertinent part:

4. *ACTION*. A single Institution Discipline Committee will be established in each Bureau of Prisons Institution. The Committee will be composed of at least three (3) members, of whom two (2) will be of department head level or above; the Chairman will be of the level of department head or above. This requirement as to the level of members will not apply to Community Treatment Centers or Camps.

The Chief Executive Officer of each institution will delegate to the Institution Discipline Committee the authority to order an inmate placed or retained in disciplinary segregation, to order the withholding or forfeiture of good time, and to order an inmate transferred for disciplinary reasons. The authority to impose sanctions other than disciplinary segregation, withholding or forfeiture of good time and transfer for disciplinary reasons will be lodged

7. *INCIDENT REPORT AND INVESTIGATION*.

(a) *Incident Report:* Informal resolution of incidents involving violations of institution rules or regulations is encouraged. However, where an em-

ployee witnesses or has a reasonable belief that a violation of institution rules or regulations has been committed by an inmate, and where the employee deems that informal resolution of the incident is unwarranted, the employee shall prepare an incident report and forward it to the appropriate correctional supervisor. The appropriate correctional supervisor may informally dispose of the incident report or forward the incident report for further disposition consistent with the policy statement.

The reporting employee should complete Part 1 of the incident report immediately. The incident is to be one of the Prohibited Acts listed in paragraph 6(f) of this policy statement. The entire language of the Prohibited Act(s) does not have to be copied. Only the relevant portion need be used. For example, "Destroying Government Property, Code No. 152," "Possessing narcotics, Code No. 801" would be acceptable listings for appropriate charges.

The description of the incident should contain the details of the activity which is being reported. All facts about the incident which are known by the employee should be recorded. If there is anything unusual about the inmate's behavior, this should be noted. The reporting employee should also list any staff or inmate witnesses to the incident, and the disposition of any physical evidence (weapons, property, and etc.) which the employee may have personally handled. The reporting employee will sign the report and indicate his title in the appropriate blocks. The incident report should then be forwarded to the appropriate correctional supervisor for disposition.

(b) *Investigation:* The investigation should be conducted within 24 hours of appointment of the investigator, unless circumstances beyond the control of the investigator intervene. The investigating officer should ordinarily be an employee of supervisory level and may not be the employee reporting the particular incident in question. Where it appears likely that the incident may be the subject of a criminal prosecution, investigation should be suspended and the inmate should not be questioned until the FBI interviews have been completed. (See Policy Statement 2200.1.)



Ordinarily, an inmate will be given a copy of the incident report by the investigating officer at the beginning of the investigation. If the investigation is delayed for any reason, any employee may deliver the charges to the inmate. The date and time the inmate receives a copy of the Incident Report will be noted. This should be done within eight (8) hours from the time the investigator received his assignment, unless there are exceptional circumstances which prevent it. The investigator should also read the charges to the inmate and obtain his statement concerning the incident, except as provided above. Comment about the inmate's attitude may be included here.

The investigator should then thoroughly investigate the incident. He should talk to witnesses, and summarize their statements. The disposition of evidence should be recorded. Often, he will want to talk to the reporting employee to obtain his report first hand and to clarify any questions the investigator may have. All steps and actions taken should be recorded on the incident report.

Under Comments and Conclusions, the investigator may include his comments on the inmate's prior record and behavior, his analysis of any conflicts between witnesses, and his conclusions of what in fact happened. The inmate does not receive a copy of the investigation. However, should the case ultimately be forwarded to the Instituion Discipline Committee, the investigation should be given to the inmate's staff representative for use in presentation on the inmate's behalf.

8. *MINOR DISPOSITIONS.* The Chief Executive Officer of each institution shall delegate to such

persons he selects the authority tc impose minor dispositions and sanctions for violations of institution rules or regulations. Where the institution has a unit management system, the authority to impose minor dispositions and sanctions shall be delegated to staff members of an inmate's unit. Minor dispositions and sanctions are those actions imposed for violation of institution rules or regulations other than segregation, withholding or forfeiture of good time, and transfer for disciplinary reasons. While the process by which minor dispositions are imposed is left to the discretion of the Chief Executive Officer of each institution, the following minimum standards will apply throughout the Bureau of Persons:

(a) Each inmate charged with violating an institution rule or regulation shall be given a written copy of the charge or charges against him within 24 hours of the infraction.

(b) Each inmate so charged will be entitled to a hearing held within 48 hours (excluding weekends and holidays) of the incident to consider the charge brought against him.

(c) The inmate will be entitled to be present at the hearing except during deliberations of the decision maker and where institutional security would be jeopardized. The reasons for excluding an inmate from the hearing must be well documented in the record.

(d) The inmate will be afforded the opportunity to make a statement and present documentary evidence in his own behalf.

(e) the inmate will be given a written copy of the decision and disposition. Review of any action taken as a minor disposition will be pursuant to the Administrative Remedy Procedure, Policy Statement 2001.6A.

(f) Where an alleged violation of institution rules or regulations warrants consideration for other than minor sanction, the charge may be referred to



the Institution Discipline Committee for hearing and disposition. Copies of all relevant documents should be forwarded to the Chairman of the Institution Discipline Committee with a brief statement of reasons for the referral along with any recommendations for appropriate disposition should the inmate be found to have committed the act charged.

(g) When charges are to be referred to the Institution Discipline Committee, the inmate shall be advised of the rights afforded at a hearing before the institution Discipline Committee. He shall be asked to indicate his choice of staff representative and the names of any witnesses he wishes to be called to testify on his behalf at the hearing. (A sample form that may be used for this purpose is attached to this policy statement. Time limits imposed in this section may be extended for good cause.)

(h) Where the person or persons delegated the authority to impose minor dispositions determines that the inmate is innocent of committing any prohibited act, the inmate's file shall be expunged of the incident report lodged against him.

9. *INSTITUTION DISCIPLINE COMMITTEE.*

(a) *Composition:* The Chief Executive Officer may appoint any members to the Institution Discipline Committee as he deems appropriate. No fewer than three members, including the Chairman, must be present at any hearing to constitute a quorum. The Chairman and no less than one member present at the hearing will be of the department head level or higher. The third member of the committee need not be of department head level. For the purposes of this section, "department head" includes acting department head. This requirement as to the level of staff members and Chairman will not apply to Community Treatment Centers or Camps. In order to insure impartiality, a staff member may not sit as a member of the

Institution Discipline Committee if he reported or investigated the incident of rules infraction being considered. Ordinarily a staff member witnessing an incident under consideration should not sit as a member of the Institution Discipline Committee. However, a staff member witnessing an incident may sit as a member of the Institution Discipline Committee where the incident is so widely witnessed that virtually every staff member has witnessed it in whole or part. Likewise, a staff membr may not sit as a member of the Institution Discipline Committee if he played any significant part in having the charges referred to the Institution Discipline Committee for consideration. The Chief Executive Officer should appoint members to this Committee who are broadly representative of the primary areas of institutional administration and who are fully knowledgeable of the requirements of this policy statement and of the functions of Inmate Discipline.

(b) *Functions:* The Institution Discipline Committee shall conduct hearings, make findings, and may impose appropriate sanctions on incidents of inmate misconduct referred to it for disposition in accordance with the due process standards as listed below. While this Committee may impose any lesser sanctions available, only this Committee will have the authority to order: (1) an inmate placed in disciplinary segregation, (2) an inmate's good time withheld or forfeited, or (3) an inmate transferred to another institution for disciplinary reasons. This Committee will also conduct reviews of inmates placed in disciplinary segregation in accordance with requirements listed below.

(c) *Procedural Requirements:* An inmate may not be placed in disciplinary segregation, or have his good time withheld or forfeited, or be transferred to another institution for disciplinary reasons unless there has been a fact-finding hearing



before the Institution Discipline Committee in which the following procedures have been satisfied:

(1) An inmate will be given advance written notice of the charge(s) against him no less than 24 hours before his appearance before the Institution Discipline Committee. An inmate may waive in writing this 24 hour notice requirement.

(2) An inmate will be provided the service of a full-time staff member to represent him at the hearing before the Institution Discipline Committee should he so desire. The Chairman shall arrange for the presence of a selected staff representative. If the staff member selected declines or is unavailable because of absence from the institution, the inmate should be given the options of selecting another representative, or in the case of an absent staff member, of waiting a reasonable period for his return, or continuing the hearing without a staff representative. A staff representative should be given adequate time to speak with the inmate and interview requested witnesses where appropriate. While it is expected that a staff member will have had ample time to prepare prior to the hearing, delays in the hearing to allow for adequate preparation may be ordered by the Chairman of the Institution Discipline Committee.

(3) An inmate will be permitted to have witnesses called and to present documents in his behalf, provided the calling of witnesses or the disclosure of documentary evidence would not jeopardize or threaten institutional security. The Chairman will call those witnesses he deems reasonably available and necessary for an appreciation of the circumstances surrounding the charge. Repetitive witnesses need not be called. Unavailable witnesses may be asked to submit written statements. Reasons for declining to call requested witnesses will be documented in the Committee's report. Witnesses requested by the inmate who are called should be questioned by his staff representa-

tive or where staff representation has been waived, by members of the Committee. Inmates who have waived the services of a staff representative may submit questions for requested witnesses in writing to the Committee.

(4) The Institution Discipline Committee will prepare a record of its proceedings which need not be verbatim. This record must be sufficient to document the advisement of inmate rights, the Committee's findings, the Committee's decision, the specific evidence relied on by the Committee, and a brief statement of the reasons for the sanctions imposed. The evidence relied upon for the decision and the reasons for the actions taken should be set out in specific terms unless doing so would jeopardize institutional security. (A sample form that may be used to advise an inmate of his rights at an Institution Discipline Committee hearing is attached to this policy statement.)

(5) An inmate will be permitted to be present throughout the Institution Discipline Committee hearing except during deliberations of the Committee and except where institutional security would be jeopardized. The reasons for excluding an inmate from the hearing must be well documented in the record. A hearing may be conducted in the absence of an inmate where the inmate refuses to appear and he can not be brought to the hearing without the use of force. When an inmate escapes from custody, the Institution Discipline Committee will conduct a hearing in the inmate's absence at the institution from which the escape occurred. When an inmate who has had sanctions imposed (such as loss of good time) while absent from custody, returns to custody, he will be advised of his right to have the escape charge brought before the Institution Discipline Committee at the institution where he returned to custody. All the procedural requirements of Institution Discipline Committee hearings will apply to this rehearing except written



statements of witnesses not readily available may be liberally used instead of live witnesses. The Institution Discipline Committee, upon rehearing, may dismiss the charge, or may modify but may not increase the sanctions previously imposed in the inmate's absence.

(d) *Dispositions of the Institution Discipline Committee:* The Institution Discipline Committee shall have available a broad range of sanctions and dispositions. These dispositions and sanctions will include the following:

The Institution Discipline Committee may

(1) Dismiss any charge(s) before it where appropriate and shall order the record of charges expunged where the inmate has been determined innocent of the charge(s).

(2) Impose sanctions and dispositions available to the person or persons designated to impose minor dispositions.

(3) Direct that an inmate be placed or retained in disciplinary segregation pursuant to guidelines contained in this policy statement.

(4) Direct that an inmate's good time be withheld. Withholding of good time should be limited to misconduct or offenses; it should not be applied as a universal punishment to all persons in disciplinary segregation status. Withholding shall be limited to the good time creditable for the single month during which the violation occurs. (Some offenses, such as refusal to work at an assignment, may be recurring, and thus may permit consecutive withholding actions.) Withheld good time may be considered for restoration at any time.

(5) Direct that an inmate's goodtime be forfeited. The good time available for forfeiture is limited to an amount computed by multiplying the number of months served at the time of the offense for which forfeiture action is taken, by the applicable monthly rate specified in 18 United States Code, Section 4161 (less any previous forfeiture or

withholding outstanding), plus extra good time which may have been earned to the date of the offense. All or part of an inmate's accumulated good time may be forfeited. Authority to restore all types of forfeited and withheld good time is delegated to the Institution Discipline Committee of each institution. Forfeited good time may be considered for restoration at any time.

(6) Direct that an inmate be transferred to another institution for disciplinary reasons. Where a present or impending emergency requires immediate action, an inmate may be transferred prior to an Institution Discipline Committee hearing. However, a hearing before the Institution Discipline Committee at the receiving institution must be conducted as soon as practicable under the circumstances to consider the factual basis of the charge of misconduct and the reasons for the emergency transfer. Transfers for disciplinary reasons prior to a hearing before the Institution Discipline Committee are to be used only in emergency situations and only with the approval of the receiving Regional Director. However, when an inmate is transferred under these circumstances, the sending institution will forward copies of incident reports with completed investigation to the receiving institution for purposes of the hearing before the receiving institution's Institution Discipline Committee. All procedural requirements applicable to Institution Discipline Committee hearings contained in paragraph 9(c) of this policy statement will be utilized, except written statements of unavailable witnesses may be liberally accepted instead of live testimony.

(7) Suspend the execution of any sanction it imposes.

(e) *Criminal Prosecutions:* Where an inmate's misconduct may also be the subject of a criminal prosecution, it is not necessary to await the outcome of the criminal trial before taking disciplinary action, especially if there is reason to believe there



will be a long delay before the trial is held. An inmate under investigation of the FBI or other law enforcement officers for an offense committed in the institution may not be questioned about the charge until the FBI interviews are completed. An inmate who is the subject of criminal prosecution for instituional violations will not be transferred from the jurisdiction of the trial court without the consent of the appropriate United States Attorney or the Court in which the trial is pending.

10. *APPEALS FROM INSTITUTION DISCIPLINE COMMITTEE ACTIONS.* At the time the Institution Discipline Committee gives an inmate notice of its decision, the Committee will also advise the inmate that he may appeal the Committee's decision to the Chief Executive Officer. Appeals must be filed no later than thirty (30) days after notice of the decision. This time limit may be extended for good cause shown. An inmate wishing to appeal any disciplinary action imposed as a result of a hearing before the Institution Discipline Committee must use the procedures and forms provided for by Policy Statement 2001.6A (Administrative Remedy of Complaints Initiated by Offenders in Bureau of Prisons Facilities). The Chief Executive Officer may approve, modify, or reverse any disciplinary action of the Institution Discipline Committee as he deems appropriate. This authority may not be delegated. The Chief Executive Officer may not increase the amount of forfeiture imposed.

An inmate may appeal an adverse decision of the Chief Executive Officer through the appeal procedures contained in Policy statement 2001.6A to the appropriate Regional Director. Appeals to the Regional Director from adverse decisions from the Chief Executive Officer must be filed no later than thirty (30) days from the date of the Chief Executive Officer's decision.

Additionally, appeals of adverse decision from the Regional Director may be made to the Assistant Director, General Counsel and Review within thirty (30) days of the decision from the Regional Director.

On appeal the following factors will be considered:

(a) Was there substantial compliance with the Policy Statement on Inmate Discipline?

(b) Was the decision of the Institution Discipline Committee based on substantial evidence?

(c) Under the circumstances, was the sanction imposed disproportionate to the offense?

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CLERK

No. 84-732

In The

# Supreme Court of the United States

October Term, 1984

THEODORE CLEAVINGER, MARVIN MARCADIS, and TOM P. LOCKETT,

*Petitioners,*

v.

DAVID SAXNER and ALFRED CAIN, JR.,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

## BRIEF FOR RESPONDENTS IN OPPOSITION

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## STATEMENT OF FACTS*

Plaintiffs David Saxner and Alfred Cain were prisoners at the Federal Penitentiary in Terre Haute, Indiana in January of 1975. Saxner was serving a 4 year sentence for a marijuana related offense, while Cain was serving a 5 year sentence. [Tr. pp.4, 98] Both were within 18 months of their maximum release dates, both were due to appear before the Parole Board within the next few months, and both had excellent prison conduct records. [Pl 10, 15]

On January 6, 1975, a black prisoner, William Lowe, died in the Terre Haute Prison hospital under highly suspicious circumstances. He was the first of four black prisoners to die in the hospital in the next seven month period. [Tr. p.5] Lowe's death triggered extreme concern among Terre Haute prisoners, and many participated in a peaceful two day work stoppage on January 7th and 8th to protest his death. [Tr. p.7, Pl. 1] Neither Plaintiff participated in this work stoppage. [Tr. pp.7-8, 118] Rather Saxner, a white prisoner and respected "jailhouse lawyer," and Cain, a black prisoner and the librarian for the African and New World Cultural Society, concentrated their efforts on gathering information concerning Lowe's death and the conditions at the prison hospital, and on informing interested members of the press, Congress,

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*The facts of this case, as summarized in the opinion of the Seventh Circuit and by the Defendants in their Petition, fall far short of capturing the reality of the disciplinary hearings afforded to the Plaintiffs pursuant to the Federal Bureau of Prisons Policy Statement on discipline in effect in 1975. Plaintiffs have therefore submitted this detailed Statement of Facts in order that this Court may be fully informed of the proof at trial.

prison officials, and Saxner's attorney, ACLU lawyer Arpiar Saunders, of the results of the investigation. [Tr. pp.9-10, 118-119] This investigation included the interview of several prisoners who had recently been confined in the prison hospital. [Tr. pp.14-16, Pl. 3] As a result of Plaintiffs' work, a judge, a senator, and several congressmen were contacted, and they wrote letters to the Warden. A national letter writing campaign was launched, accounts were written in several publications, the Assistant Surgeon General came to Terre Haute to investigate, the prison doctor resigned, and ultimately a lawsuit arising from the last of the four hospital deaths was filed. [Tr. pp.9-12, 92-3, 166-7, 179-80, 183] *See Green v. Carlson,* 581 F.2d 669 (7th Cir. 1978), aff'd *Carlson v. Green,* 446 U.S. 14 (1980). During the six weeks following Lowe's death, a "considerable amount of momentum" had been built with Congress, lawyers, and others by the Plaintiffs' investigation. [Tr. pp.18-19]

On February 14, 1975, Plaintiff Saxner was scheduled to appear on local television as part of a cultural program. [Pl. 21] Instead he was called to the Captain's office and told that he was to be transferred to the Prison Farm—a separate enclave where he would be unable to continue his investigation. When Saxner protested the transfer, he was charged with encouraging others to refuse to work. [Tr. pp.20-23] He was taken to an isolated and unused part of the hospital which was temporarily being used as a segregation unit and locked in a cell. [Tr. p.23] An hour later Cain was placed in an adjoining cell, for an identical charge. [Tr. p.24]

Both Plaintiffs remained locked in segregation at the hospital 24 hours a day for the next seven days. [Tr. p.



23] On February 21st, they were brought before the Institutional Disciplinary Committee (IDC) for a "hearing" on the charge. The Committee was made up of three long-time Bureau of Prisons employees who had worked their way up through the ranks from prison guard. Defendant Cleavenger, the Assistant Warden of Programs, was the Chairman of the Committee. He was in charge of the correctional force, education, and classification and parole within the prison, and had been a correctional officer for twenty-one years. [Tr. pp.346-371] Defendants Lockett and Marcadis, two other long-time correctional employees, were the other members of the IDC. Lockett was in charge of classification and parole, while Marcadis was an "operational lieutenant" and acting Captain.* [Tr. p.231]

The Warden sought as IDC members those officers who had "dealt with inmates on a more daily basis." [Tr. pp.229-230, 272-3] There was no training, instruction or education given to these IDC members, other than that they were to follow the policy statement on discipline.

The Bureau of Prisons Policy Statement on Discipline which was operative on and before February 14, 1975, [Pl. 7] did not provide for the presence or cross examination of adverse witnesses, representation by a lawyer, a taped or otherwise verbatim record of the proceedings, a standard of proof, clearly defined standard of punishment, or for non-agency or judicial review. Although the policy statement permitted a prisoner to call

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*According to Warden Benson, either Cleavenger or Captain DuBois briefed him prior to Plaintiffs' hearing on the "investigation" and informed him that the Plaintiffs were "suspects," and "under investigation." [Tr. p.233]

witnesses unless security or repetition prevented it, that was not the practice at Terre Haute. By the Defendants' own admission, live testimony was "not the common way" and guards never appeared before the Committee to present evidence. [Tr. pp.387, 401]

Saxner was brought before the Committee on the charge of "Encouraging Others to Refuse to Work." The "investigation" of the incident stated that Saxner:

> . . . stated that this charge was totally absurd and that he was categorically innocent. He stated that he was charged with this because he refused to go to the Farm Camp. He said he had nothing else to say. His attitude was fair during the interview,

and listed as "other facts" only that "considering the various items picked up from this man's cell, I would say there is little doubt about his activities." [Pl. 5, p.2]

These items, obtained in a search of Saxner's cell, were attached to the report. They consisted of a four page "press release" entitled "Prisoners at Terre Haute Seek an Investigation" which Saxner had sent to fifty newspapers [Pl. 1, Pr. pp.11-12]; a four page document which detailed interviews with prisoners on the subject of their medical treatment at the hospital [Pl. 3]; and a letter from Saxner to ACLU lawyer Arpiar Saunders which enclosed the other two documents and which discussed medical conditions, possible lawsuits on behalf of the Lowe family and segregated prisoners, communications with the press, and the obtaining of local lawyers. [Pl. 4] The remainder of the investigator's report consisted of his



conclusion "guilty as charged. A definite ringleader in the activity charged." [Pl. 1]

Neither the investigating nor charging officer was brought before the committee, nor was any more detail provided from them in writing. The "information" allegedly "received" by the charging officer—that Saxner was encouraging the work stoppage—was not detailed or verified in any way. Saxner professed his innocence, offered to take a lie detector test at his own expense, requested that he be permitted to call inmates to confirm that he was not encouraging a work stoppage, and to confront his accusers. [Tr. pp.34-35] All of these requests were denied.* The committee presented the aforementioned documents as its "evidence" against Saxner, and when it said that was all the evidence it had, both Saxner and his correctional employee representative told the Committee that the charge was "preposterous," and that it had presented no evidence of encouraging a work stoppage. The staff representative said that the committee would have to "reword the charges or present more evidence because . . . . the evidence didn't correspond to the charge." [Tr. pp.31-32]

The committee then caucused and, *sua sponte*, orally charged the Plaintiff with two new "offenses": "unauthorized use of the mails" for mailing the press release

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*The requests for witnesses were denied because they were allegedly repetitive of affidavits presented by Saxner. [Tr. pp. 357-358] The Committee's attitude about the credibility of prisoner testimony is demonstrated by its statement that it would be "very foolish" to take other prisoners' evidence because they "would not admit Saxner did it anyway." (Def. 10, p.2)

through the "Prisoners Mail Box" (PMB)* and possession of "contraband" for possessing the seized documents. [Tr. p.32] Saxner was given no written notice whatsoever of the new charges, and no time to prepare a defense. [Tr. p.35] Even the Warden admitted that these actions directly violated existing BOP policy with regard to notice and committee composition.**

The non-verbatim "record" of the hearing which was never tendered to the Plaintiff, shows that the Committee interrogated Saxner at length with a primary focus on the contents of the seized documents and on the Plaintiffs' investigation, the contents and veracity of which the committee members repeatedly and defensively challenged. [See Def. 10, esp. pp.3-5]

Saxner protested to the Defendant Committee members that their actions violated BOP policy and the Constitution [Tr. p.33], but they nonetheless found him guilty of all three charges. [Tr. p.36] Their written "findings" did little more than reiterate the proffered charges,*** and

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*The Policy Statement on the Prisoners Mail Box which was operative at that time expressly provided for its use for mail to the media. [Pl. 2, p.11]

**The Policy Statement provided that the prisoner be given notice of the offense in writing within 24 hours of its commission, and at least 24 hours before the hearing [Pl. 7, pp. 9,10]; and further that committee members could not have also investigated, witnessed or reported the incident. [Ibid., p.10]

***Under "Reason for Action Taken" the Committee wrote: "Saxner was found Guilty of Encouraging Others to Refuse to Work from the information received from staff and the written and investigative reports. He was also found Guilty of Unauthorized Use of Mail (701) (sending manuscripts out) and Possession of Contraband (article from Prisoners Union, Leavenworth Penitentiary). It is felt the Education Supervisor, or his representative, should talk with Saxner regarding manuscripts and the regulations." (Def. 10)



the testimony of the IDC Defendants at trial revealed that their reasons for finding Saxner guilty were confused, contradictory and did not support a guilty finding of any of the charges. This testimony further showed that the Defendants improperly considered the contents and dissemination of the documents and Plaintiffs' investigation to be evidence in support of the work stoppage charge, and lent substantial support to the conclusion that it was for these constitutionally protected activities that both Saxner and Cain were in reality charged and convicted.*

Plaintiff Cain was then brought before the same IDC on an identical "encouraging" charge. He too denied the charge, offered to take a lie detector test, and requested the right to confront his accusers. These requests were denied [Tr. p.102] During the hearing a second charge—possession of contraband—was brought without prior no-

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*Defendant Cleavenger said that the documents [Pl. 1,3] "advocated an investigation" of Lowe's death, that they "talk(ed) against the institution and want(ed) to say that we are doing wrong things which is wrong" [Tr. p.356], thereby making them "contraband" and their possession a violation of the "encouraging" provision as well. [Tr. pp.356-7, 373-4] He redefined the press release to be a "manuscript" because it named staff and inmates for publication and therefore claimed that sending it through the PMB, where it would not be censored, was "unauthorized use of the mails." [Tr. pp.376-80] No policy statement or other such document defined a manuscript in this way, forbade the naming of staff or other prisoners in either a communication to the press or a manuscript, or made the mailing of a manuscript, either by PMB or regular mail, a disciplinary offense [see and compare Pl. 2, para. 3; Def. 2, particularly para. 41, 5(a) (1), (2) and (15); Pl. 22, para. A, and para.5, p.2]. Marcadis said that the documents supported the work stoppage charge because they were "inflammatory" and referred to the Lowe death as "murder." [Tr. pp. 396-397] Similarly, Benson testified that Saxner had no reason or right to investigate as he was not a "medical doctor." [Tr. p.268]

tice. [Tr. pp.106-107] The "contraband" was a 1973 letter to the Bureau of Prisons from "Inmates of Terre Haute Prison" which set forth the case for a prison labor union at Terre Haute. [Pl. 14] This document, seized from Cain's cell, was also available from the Cultural Society library. [Tr. pp.114-116] According to the hearing "record," Cain was interrogated as to whether he supported, was "talking up," or forming a labor union. Cain denied that he was, but professed that a union would be beneficial. Defendant Lockett then told him to shut up. [Tr. p.104, p.2] Cain was shown Saxner's letter to attorney Saunders, and Marcadis asked him if he had anything "in his possession that was encouraging dissension or unrest, or an attitude to encourage people to get up in arms in violation of the rules." [Tr. pp.102-103, Pl. 13, pp.2-3] Cain denied this as well, stated that he had spoken against the January work stoppage, and cited the proximity of his parole hearing and jeopardizing his college classes as further reasons why he would not have committed the offenses. [Pl. 13, pp.1,3] The "record" of the hearing further stated that "Cain identified Saxner as the writer of the letter to Arpiar Saunders." [Pl. 4, p.3]

Cain, like Saxner, was found guilty of all charges. Both men were sentenced to an indefinite stay in segregation and had approximately three months of good time "forfeited."

Cain was held in L Unit until March 21, 1975, making his entire period of segregation on these charges 35 days. He was confined in his cell for more than 23½ hours a day, had no access to the prison yard or exercise facilities, and was permitted to go outside for only one-half to one hour per week, rather than the six hours per day which



was permitted in general population. He could shower and shave only twice a week, could not attend his college classes, or use the law library or educational facilities, and had to eat in his cell rather than in the cafeteria. [Tr. 52, 108-9, 235-6] His cell window was broken, and he was deprived of much of his personal property; many books, papers and his radio were never returned to him. (See Pl. #23) He could not go to his job in the paint shop, and therefore could not earn good time which would shorten his maximum outdate. [Tr. 110-11] He could not participate as librarian of the New World Cultural Society. [Tr. 111-12]

While in segregation he was "highly frustrated" and "nervous," because he "was locked up for something he didn't do" for an indeterminate period of time, and because he could not make parole unless the case were overturned. [Tr. 123] In fact, Cain did not make parole in June, and instead was released on his maximum outdate in December, a date which he was unable to shorten by earning good time while he was segregated.

Saxner was sent to G Unit and spent the first week in the Unit's first cell. The cell had no window or functioning light bulb, and he spent the first five days in near total darkness until his complaints were heard and a new light bulb supplied. [Tr. 41-2] The conditions in the cell were "repulsive." Vomit and feces were caked on the walls, floor and toilet seat. He was not permitted to leave his cell, where it was extremely hot due in part to poor ventilation. [Tr. 41-2, 46, 78] He had no pillows, blankets or sheets and no cleaning materials for several days, although he repeatedly requested them. The unit was "infamous" for beatings, and he witnessed a beating during

his stay there. [Tr. 37-40, 55] Conditions in G Unit were even more restrictive than in L, as it was used to house especially dangerous prisoners. [Tr. 37-40, 77] Saxner brought these repulsive conditions to the specific attention of Defendant Cleavenger by a letter dated February 24th [Pl. 8, T. 43-44], and in person to Defendant Marcadis who visited G Unit a "number of times" during the week Saxner was held there. [Tr. 45] After seven days, he was transferred to L Unit for an additional two weeks, where he was subjected to similar conditions as Plaintiff Cain. He too spent a total of thirty five days in segregation.

Saxner likewise suffered fear and anxiety while in segregation. He feared physical harm, particularly while in G Unit. [Tr. 55] He lost weight, and harbored a constant fear that he would not make parole because it was Bureau of Prisons' policy to deny parole if a prisoner had lost good time in the six months prior to the Board appearance. [Tr. 54, 55] He had a deservedly high expectation of making parole before the loss of good time, and dreaded the loss of fifteen months of freedom during his entire stay in segregation. [Tr. 53, 58, Pl. 10]

It was Bureau of Prisons policy for the IDC committee to "review" segregation cases after ten days. [Tr. 366] The Defendants, if they followed Bureau of Prisons policy, held this review and continued Plaintiffs in segregation. The Plaintiffs appealed to Warden Benson, and, on March 21st their appeal was partially granted at his recommendation. They were returned to general population and their good time was restored, but their request for expungement was denied. (Pl. 10) They appealed to the Regional Office of the Bureau of Prisons, and after the Regional Office so recommended, the Plaintiffs were



granted expungement on April 11th. [Tr. 63] Warden Benson claimed that the action was taken because of pressure from Saxner's family, and because of due process violations [Tr. 273, 275] rather than due to their innocence; the Bureau Policy Statement on Discipline, however, mandates expungement only where the "inmate has been determined innocent of the charges." [Pl. 7, para. 9(d) (1), at p.12]

Saxner appeared before the Parole Board on April 11, 1975, was granted parole, and was released on April 25th. Cain went to the Board in June, but was continued to his maximum date in December, when he was finally released. Both have remained on the street since that time, both have families, and both have been gainfully employed since their release. [Tr. 3-4, 97]

———o———

## REASONS FOR DENYING THE WRIT

The Defendants assert that certiorari should be granted because the opinion below, holding that federal prison Institutional Disciplinary Committee (IDC) members are entitled to qualified immunity only ignores the "functional analysis" of *Butz v. Economou*, 438 U.S. 478 (1978), and is in conflict with the Fourth Circuit's opinion in *Ward v. Johnson*, 690 F.2d 1098 (4th Cir. 1982). These assertions are without merit. The opinion below is in complete accord with *Butz* and is clearly distinguishable from *Ward*. There are, therefore, no compelling reasons which require that certiorari be granted.

## A. The Seventh Circuit Properly Applied The Factors Set Forth In Butz v. Economou In Concluding That The Defendant IDC Members Are Entitled To Only Qualified Immunity.

Numerous decisions of this Court over the years have clearly established the general rule that executive officials are entitled to only qualified immunity from damages liability for constitutional deprivations. *See Wood v. Strickland,* 420 U.S. 308 (1975); *Pierson v. Ray,* 386 U.S. 547 (1967); *Scheuer v. Rhodes,* 416 U.S. 232 (1974); *Procunier v. Navarette,* 434 U.S. 563 (1978). This general rule, however, is "subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." *Butz,* 438 U.S. at 507.

One of those "exceptional situations" applies to executive officials, such as prosecutors, who are so closely connected to the judicial process that they are entitled to a "quasi-judicial" absolute immunity. *See Imbler v. Pachtman,* 424 U.S. 409 (1976). Based on the concept of "quasi-judicial" immunity, this Court in *Butz* carved out an additional narrow exception to the general rule of qualified immunity for executive officials. The *Butz* Court recognized that certain executive officials—specifically, hearing officers subject to the Administrative Procedure Act (APA)—were "functionally comparable" to judges and were entitled to "quasi-judicial" immunity for acts committed in their adjudicatory capacity. The Court reached this conclusion, however, only after finding 1) that the adjudicatory process involved contained sufficient safeguards to reduce the need for private damage actions as a means of controlling unconstitutional conduct; 2) that the responsibilities of the hearing officers were functionally



comparable to those of a judge and the specific acts complained of were adjudicatory in nature; and 3) that the performance of the official's adjudicatory duties made him or her a likely target for harassing or intimidating litigation. *See Butz,* 438 U.S. at 512-513.

The Defendant hearing officers in *Butz* met each of these requirements. The Defendant IDC members in the instant case meet none.

### 1) The lack of procedural safeguards contained in the Federal Bureau of Prison's Policy Statement which governed institutional disciplinary proceedings at the time of Plaintiffs' hearings requires that I.D.C. members be entitled to only qualified immunity.

Under *Butz,* absolute immunity attaches only to those executive officials who are engaged in an adjudicatory process which contains "many of the same safeguards as are available in the judicial process," such as the impartiality of the decision-making process; the reliability of the information developed; the importance of precedence in resolving controversies; the adversary nature of the proceedings; and the availability of review. *Butz,* 438 U.S. at 512-513.

The *Butz* Court found that the Administrative Procedure Act contained sufficient safeguards since its protections included notice, representation by a lawyer, a verbatim transcript of the proceedings, subpoena power, presentation of oral and documentary evidence, cross-examination of adverse witnesses under oath (limited only by considerations of relevancy and materiality), rebuttal evidence, and prehearing discovery. 5 U.S.C. §§554-557. The

Act also provides for imposition of a burden of proof, and findings and conclusions presented by the parties and ruled on by the hearing officer. Also, the hearing officer may not be involved in prosecutorial or investigative duties or be supervised by an employer interested in the case, and is subject to recusal for personal bias. 5 U.S.C. §§554-557, 701-702.

Comparison of the disciplinary policy of the Federal Bureau of Prisons in effect at the time of this incident with the APA clearly establishes that the prison disciplinary adjudicatory process falls woefully short of the requirements of *Butz*. It provided precious few of the procedural safeguards contained in the APA. Prisoners, typically uneducated and unschooled in law or procedure, were afforded neither a lawyer nor an independent non-staff representative. There was no right to compel witnesses or to cross-examine adverse witnesses under oath; no right to discovery, rebuttal, findings of fact or conclusions of law. Nor was there a cognizable standard of proof. No verbatim transcript of the hearings was made. As Judge Cudahy recognized in his concurring opinion below:

> The disciplinary policy of the Bureau of Prisons provides few of the safeguards of the APA. The committee members are prison guards and supervisory employees who are in daily contact with the prisoners upon whom they sit in judgment. The committee members are supervisors and fellow employees of the guards who bring the charges and are in an unequal adversarial relationship with the prisoners. They are the keepers judging the kept rather than impartial adjudicators trained in law and presumably free of bias and prejudice. In addition, the information presented to the committee is frequently hearsay, self-serving and unreliable. *See Bracy v. Herringa*, 466 F.2d 702 (7th Cir. 1972). Of course, the decisions of the committee are not based on precedent since there is no recorded precedent. And review is restricted to agencies of the Bureau of Prisons. To suggest that the committee functions in any real respect like the administrative law judge in *Butz* is to depart from reality.



*Saxner v. Benson*, 727 F.2d 669, 675 (7th Cir. 1984) (Cudahy, J., concurring).

**2) The particular facts and circumstances of Plaintiffs' hearings and the multiple roles played by the I.D.C. members at those hearings—that of accuser, interrogator, prosecutor, judge and jailer —go far beyond a limited "quasi-judicial" capacity and further entitle the Defendants to only qualified immunity.**

*Butz* also requires that the executive official who seeks absolute immunity be limited to performing "quasi-judicial" adjudicatory acts. The Defendants rely on certain selected aspects of their involvement in the incident here in an attempt to bolster their claim for absolute immunity. In fact, the record as a whole in this case graphically underscores why these Defendants should not receive absolute immunity. The hearings involved here were in no way "quasi-judicial" adversarial proceedings, with a reliable fact finding process, impartial fact finders or minimal procedural safeguards. Rather, the hearings were part of an inquisitional process, wherein the IDC Defendants acted as the charging guards, the interrogators, the prosecutors, the judges and the jailors.

There was evidence that at least one of the Defendants, Cleavenger, participated in the investigation of the

Plaintiffs, a function not entitled to absolute immunity. *Hampton v. Hanrahan,* 484 F.2d 601 (7th Cir. 1973). The inquisitional nature of the proceedings was further reflected by the detailed interrogation of the Plaintiffs by the Defendants—a function performed historically by law enforcement officers who are entitled to qualified immunity only. *Pierson v. Ray,* 386 U.S. 547 (1967). One of the Defendants was an operations Lieutenant, specifically in charge of the Plaintiffs' custody in segregation following the hearings. Two of the Defendants were responsible for the Plaintiffs' parole and security classifications.

Perhaps most importantly, the Defendants here, after being confronted with the abject weakness of the original charges against Plaintiffs, took it upon themselves to bring additional charges against the Plaintiffs, without prior notice, and proceeded to try and convict the Plaintiffs on those new charges. Thus, one of the major due process violations found by the jury here—the bringing of additional charges without notice—is clearly not an adjudicatory function. Rather it is a law enforcement function. In the prison context, it is the function of a guard. Not even judges are afforded absolute immunity for the act of charging, trying and convicting a defendant. *See Zarcone v. Perry,* 572 F.2d 52 (2nd Cir. 1978). Moreover, the normally unequal and adversarial quality of the inmate-keeper relationship was further exacerbated here by the Plaintiffs' outspoken public criticism of the Defendants and their institution, whom they were investigating on serious charges. The evidence at trial strongly suggested that Plaintiffs were charged and segregated by these Defendants in retaliation for pursuing these constitutionally protected rights. *See, e.g. Johnson v. Avery,* 393 U.S. 483 (1969);



*Bounds v. Smith,* 430 U.S. 817 (1977). As Judge Cudahy stated below:

> The activities and procedures of these prison officers are so dissimilar in form and substance from those of judges granted absolute immunity that reliance on an all-encompassing similarity of quasi-judicial function will not wash. As Chief Judge Winter has pointed out, performance of "quasi-judicial" functions does not automatically trigger absolute immunity. *Ward v. Johnson,* 690 F.2d 1098, 1115 (4th Cir. 1982) (Winter, C.J., dissenting). Thus, in *Wood v. Strickland,* 420 U.S. 308, 320-321, 95 S.Ct. 992, 1000, 43 L.Ed.2d 214 (1975), school board members, who were sued for due process violations in disciplinary proceedings, were afforded only qualified immunity. *See Ward v. Johnson,* 690 F.2d at 1115-16 (Winter, C.J., dissenting). The prison disciplinary proceedings at issue here are certainly much more akin to the school board meeting in *Wood* than to a hearing conducted by an ALJ under the Administrative Procedure Act.

*Saxner v. Benson,* 727 F.2d 669, 674 (7th Cir. 1984) (Cudahy, J., concurring).

It is clear that the unconstitutional actions of *these* Defendants in *this* case should not be cloaked with absolute immunity.

**3) The Defendants have made no showing that performance of their duties as IDC members will make them a likely target for harassing or intimidating litigation.**

The Defendants assert that IDC members "face a severe threat of harassing or intimidating litigation" because "prisoners as a group are prodigious and indiscriminate litigators." They then predict dire consequences to

both the prison disciplinary system and the federal courts, as a flood of litigation will result unless IDC members are afforded absolute immunity. The Defendants support this argument by citing a statistic which informs that 35% of the Seventh Circuit's civil docket are "prisoner suits" (Defendants' Petition at 10, 18-19).

In reality, the Defendants' statistic is highly misleading. When "prisoner suits" are separated into civil rights and habeas corpus categories, it is revealed that only 2% of the civil cases pending against federal officials on June 30, 1983 in the District Courts of the Seventh Circuit were prisoner civil rights cases—a Circuit which includes four major federal prisons. Similarly, as of June 30, 1983 less than 7% of the civil appeals pending in the Seventh Circuit were prisoner civil rights cases against federal officials.* Moreover, these percentages must be further reduced in order to properly analyze the Defendants' contention, because the civil rights category includes injunctive as well as damages cases.

Finally and most importantly, prisoner damages lawsuits against prison officials who are acting as disciplinary board members comprise a very small percentage of prison damages suits filed against prison officials. The Seventh Circuit has expressly sanctioned damages suits against IDC members for at least 10 years. [See *Chapman v. Kleindeinst*, 507 F.2d 1246 (7th Cir. 1974).] Yet, in that time, it has reviewed less than 15 prisoner damage claims against prison disciplinary board members. And, in the

*These statistics are taken from the Annual Report of the Director of the Administrative Office of the U.S. Courts (1983).



majority of those cases, the claims were substantial and the prisoner prevailed. This is hardly evidence of a barrage of harassing litigation, as the Defendants contend.

**4) Public policy is best served by allowing IDC members only a qualified immunity.**

An overriding concern expressed by this Court is that grants of absolute immunity are appropriate only when the defendant official establishes that public policy so requires. *Butz v. Economou*, 438 U.S. 478, 506 (1978); *Harlow v. Fitzgerald*, 457 U.S. 800, 808 (1982). The Defendants here have made no showing that any public policy requires that they be granted absolute immunity. In fact, the result urged by the Defendants here would, as in *Butz*, result in a policy which is "contrary to the course of decision in this Court from the very early days of the Republic." *Butz*, 438 U.S. at 487.

In *Marbury v. Madison*, 1 Cranch 137, 163, 2 L.Ed. 60 (1803), this Court recognized that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." In *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 395 (1971), the Court observed that, "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."

To grant IDC members absolute immunity would be to deprive prisoners of their basic right to a damage remedy for violation of their constitutional rights. Such a result is ill considered and unnecessary. Prisoners, perhaps more than any other powerless group in our society, have historically looked to the courts for protection from, and

redress for, abuses inflicted upon them by their keepers. To deny prisoners access to the courts, and to a remedy for the deprivation of their constitutional rights, would leave them at the mercy of officials, whose goals of a tightly run, trouble free institution ofttimes result in policies which conflict with the fundamental rights of the prisoners.*

It is clear that the proper balance to be struck between the rights of prisoners to a damage remedy and the legitimate concerns of prison IDC members, is to afford the latter only a qualified immunity from damages liability. Officials who possess such a qualified immunity have an increasing arsenal available to them to promptly dispose of any insubstantial "harassment" lawsuits with a minimum of cost and inconvenience.

For example, in *Butz*, this Court recognized that, "Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading" and stated:

> Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss. Moreover, the Court recognized in Scheuer that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. See 416 US, at 250, 40 L.Ed.2d 90, 94 S.Ct. 1683, 71 Ohio Ops. 2d 474. In responding to such a motion, plaintiffs may not play dog in the manger; and firm

*In fact, allowing a legal damage remedy for violations of constitutional rights furthers these penological goals by providing prisoners a non-violent method of redress through which to channel their sense of having been wronged by prison officials.



> application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.

*Butz*, 438 U.S. at 507-508. Moreover, under this Court's recent modification of the qualified immunity standard, the defendant is entitled to immunity if it can be shown that the right complained of was not clearly established, thus allowing for prompt disposition without the necessity of pretrial discovery proceedings. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Finally, in most circuits if the defendant's qualified immunity claim is denied by the trial court, he or she is entitled to a pretrial appeal of that ruling. *See McSurely v. McClellan*, 697 F.2d 309 (D.C. Cir. 1982); *Evans v. Dillahunty*, 711 F.2d 828 (8th Cir. 1983); *Krohn v. United States*, 742 F.2d 24 (1st Cir. 1984). *Contra, Forsyth v. Kleindeinst*, 729 F.2d 267 (3rd Cir. 1984), *cert. granted*, No. 84-335, October 29, 1984 (53 U.S.L.W. 3311).

These legal weapons available to defendants who possess qualified immunity are more than sufficient to protect them from any perceived threat of harassment. In the context of prison disciplinary cases, all these IDC officials have to do is follow the clear and simple constitutional requirements of *Wolff v. McDonnell*, 418 U.S. 539 (1974), and they have no reason to fear harassment or liability.

Additionally, federal prison officials enjoy further protections—they are defended, free of charge, by Government attorneys who, as this case so aptly demonstrates, are unfettered in their litigational pursuits by any financial restraints. Conversely, lawyers who would bring such cases on behalf of prisoners are deterred by their inabil-

ity to obtain an award of attorneys fees from the defendants if they prevail on the merits. *See Saxner v. Benson*, 727 F.2d 669, 673 (7th Cir. 1984); *Lauritzen v. Lehman*, 736 F.2d 550 (9th Cir. 1984). As a result, market forces will usually dictate that plaintiffs' lawyers will pursue only the most substantial claims, further reducing the likelihood of "harassing" litigation.*

**B. No Conflict Exists Between The Opinion Of The Seventh Circuit In Saxner v. Benson And The Opinion Of The Fourth Circuit In Ward v. Johnson.**

The Defendants also assert that certiorari should be allowed because the Courts of Appeals are divided on the issue of whether prison disciplinary committee members are entitled to absolute or qualified immunity. The Defendants compare the opinion below in *Saxner* and *Jihaad v. O'Brien*, 645 F.2d 556, 561 (6th Cir. 1981) (Qualified Immunity), with *Ward v. Johnson*, 690 F.2d 1098 (4th Cir. 1982) (Absolute Immunity).

In fact, the Defendants' assertion is specious and based upon the most superficial reading of those cases.

*Counsels' involvement in this case constitutes a rare exception to this general rule. Counsel, who have been involved in a substantial amount of prison litigation, committed themselves to provide legal representation to those persons who were endeavoring to bring out the truth behind the series of deaths at the prison hospital at Terre Haute Penitentiary in 1975. *See Carlson v. Green*, 446 U.S. 14 (1980). It was this commitment, rather than economic desirability, which led counsel to represent Plaintiffs Saxner and Cain on a contingent fee basis in their claims against the IDC Defendants. For what will ultimately be a potential maximum fee of $3,000.00, counsel conducted a week-long jury trial hundreds of miles from their offices, represented Plaintiffs on appeal before the Seventh Circuit, and have now prepared this Brief.



A close examination reveals that no conflict exists among the Courts of Appeals on this issue.

Comparing the result in *Saxner* with the result in *Ward* is a classic example of comparing apples and oranges. As *Butz* clearly indicates, before absolute immunity will be accorded to executive officials performing quasi-judicial functions, the adjudicatory process in which they are engaged must be examined to determine the sufficiency of its procedural safeguards. The Court in *Ward* considered the disciplinary procedures in effect in the Virginia state prison system—a system entirely distinct from that in effect in the federal prison system involved in *Saxner*.

In *Ward*, under the Virginia regulations, a prisoner was entitled to be represented by a lawyer and afforded the right to confront and cross-examine his accusers. A tape recorded transcription of the proceedings was made and the prisoner had the right to present either oral testimony or written statements. The disciplinary committee was specifically barred from discovering the prisoner's prior prison record before guilt or innocence was determined. The Fourth Circuit relied heavily on these procedural guarantees, many of which were not required by *Wolff*, in determining that the hearing in *Ward* was "adversarial" within the meaning of *Butz*. Of course, federal prison disciplinary policy at issue in *Saxner* provided for *none* of these safeguards.

Secondly, as *Butz* makes clear, absolute immunity extends only to those acts of the defendant which are judicial in nature. In *Ward*, the act of the defendants complained of—a decision not to allow the testimony of certain witnesses as cumulative—was considered an exercise

of judicial discretion in making an evidentiary ruling. In sharp contrast to *Ward*, the major violation complained of in *Saxner* was the bringing of new charges by the IDC members themselves, without prior notice, during the hearing itself—an act that cannot be described as judicial in nature.

The holding in *Ward* reveals that no conflict exists between that decision and the decision in *Saxner*. On the contrary, the language of the Court in *Ward* makes clear that had it sat on the *Saxner* case, it would have reached the same result as that reached by the Seventh Circuit:

> We are not concluding that in connection with all prison disciplinary hearings the members of the Adjustment Committee enjoy absolute immunity. Perhaps this case would be different if the plaintiff had been denied absolutely any notice of the charge against him, or if he had been denied the right to confront and cross-examine his accusers at the disciplinary hearing (through this right is circumscribed in *Wolff*), but that is not the claim of error here.
>
> • • •
>
> Our ruling illustrates the principle that every case in which immunity is claimed for members of the Adjustment Committee should be considered on its own facts, and with reference to the particular procedure under which the disciplinary hearing is held. To qualify for absolute immunity, the action involved must be of a judicial character and the procedure followed in connection with the hearing must include the 'safeguards' of a fair and impartial proceeding as stated in *Butz*. Thus, absolute immunity will not attach to action taken by the members of a committee whose functions may be properly classified as administrative or investigative rather than adjudicatory. Moreover, the procedure followed in the



> hearing must insure for the accused inmate, as far as reasonably practical, similar rights to those the typical defendant would be entitled to before a tribunal realistically insulated from prejudicial influences or bias and from whose rulings and decisions the inmate would have an effective means of appeal. Where such rights are not so "safeguarded," the criteria are for absolute immunity as established in *Butz* are not met.

*Ward*, 690 F.2d at 1108-1109.

With regard to the immunity to be afforded to federal IDC members under the policy in effect in 1975, the Courts of Appeals are not in conflict. In the only decision other than *Saxner* on the issue, the Sixth Circuit has held that an IDC hearing afforded by federal officials under the policy in effect in 1975 was an "informal disciplinary hearing" which was not "one of those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of public business." *Jihaad v. O'Brien*, 645 F.2d 556, 561 (6th Cir. 1981)

As no conflict exists among the Circuit Courts of Appeals, no reason exists to grant certiorari here.

———o———

## CONCLUSION

The opinion of the Seventh Circuit in *Saxner v. Benson* is in complete accord with this Court's decision in *Butz v. Economou*. The Defendants have demonstrated no "exceptional situation" which requires that they be accorded absolute immunity from damage liability for violation of clearly established constitutional rights. Moreover, no conflict exists between the Courts of Appeals on

the issue of the immunity to be afforded to federal IDC members.

For these reasons, the Defendants' Petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: December 27, 1984

Office - Supreme Court, U.S.
FILED
APR 5 1985
ALEXANDER L. STEVAS
CLERK

No. 84-732

# In the Supreme Court of the United States

OCTOBER TERM, 1984

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THEODORE CLEAVINGER, MARVIN MARCADIS, AND TOM P. LOCKETT, PETITIONERS

*v.*

DAVID SAXNER AND ALFRED CAIN, JR.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## JOINT APPENDIX

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**PETITION FOR WRIT OF CERTIORARI FILED NOVEMBER 5, 1984**
**CERTIORARI GRANTED FEBRUARY 19, 1985**

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## RELEVANT DOCKET ENTRIES

DAVID SAXNER AND ALFRED CAIN, JR., PLAINTIFFS,

*v.*

CHARLES BENSON, ET AL., DEFENDANTS

### PETITION FOR WRIT OF HABEAS CORPUS

| | |
|---|---|
| 3/7/75 | Petitioners files [sic] petition for writ of habeas corpus. |
| 3/21/75 | Summons issued. |
| 4/4/75 | U.S. Marshal makes return on Summons, $6.00. |
| 12/15/75 | Respondent files motion to dismiss, with memorandum in support of said motion, c/s. |
| 12/19/75 | Plaintiffs file amended complaint. Plaintiffs request trial by jury. |
| 12/19/75 | Case called. Government requests extension of time to respond to amended complaint filed this date. Court Grants 60 days. Case continued from this calendar. |
| 1/5/76 | Summons issued. |
| 2/10/76 | U.S. Marshal makes return on summons and complaint, $32.92. |
| 3/17/76 | Defendants file motion to dismiss and memorandum in support of said motion, c/s. |
| 5/13/76 | Charles Hoffman and Michael E. Deutsch file appearance for plaintiffs. Plaintiffs, by counsel, file motion for leave to amend complaint and plaintiff's [sic] response to defendants motion to dismiss, c/s. |
| 8/1/77 | Set for pre-trail Tuesday, Aug. 23, 1977 at 2:30 P.M. (SHD) |
| 8/23/77 | Defendants, by counsel, file motion for continuance of pre-trial conference, c/s. Same GRANTED and continued to Sept. 13, 1977, U.S. Courthouse, Rm. 232, at 11:30 A.M., Indpls., Ind. |
| 10/25/77 | Set for pre-trail Nov. 17, 1977 at 9:30 A.M. (CJH) |

10/27/77 This cause came before the Court on plaintiffs' civil complaint, defendants' motion to dismiss, plaintiffs' amended complaint, defendants' second motion to dismiss, plaintiffs' response to defendants' motion and motion for leave to file a second amended complaint. Court having considered said motions, now GRANTS defendants' motion in part and DENIES motion in part. The Amended Complaint is deemed filed as leave to file is not required since responsive pleading has yet been filed. The defendants' motion to dismiss for want of subject matter is GRANTED as to all grounds save those arising under 28 USC 1331 as to which it is DENIED. The motion to dismiss the claim for the expunction of the records of the incident at suite [sic] is GRANTED. The motion to dismiss claims against defendants Levi, Carlson and Henderson is GRANTED and the motion to dismiss claims against defendant Benson is DENIED.

12/2/77 Set for pre-trial Dec. 20, 1977 at 11:00 A.M. (CJH)

12/12/77 Plaintiffs file motion for production of documentary records, c/s. Respondent, by counsel, files motion to strike plaintiffs' request for production, c/s.

12/13/77 Respondent files motion for enlargement of time, c/s.

12/19/77 Plaintiffs file motion for continuance of pre-trial conference, c/s. Motion GRANTED and action is removed from pre-trial calendar and trial calendar for Jan. Term, 1978.

3/20/78 Henry E. Davis Special litigation Section, Criminal Division, U.S. Dept. of Justice enters appearance for all defendants and the appearance of Glenda G. Gordon as counsel for defendants shall be withdrawn. c/s.

8/3/78 Set for pre-trial August 25, 1978 at 10:30 A.M. (SHD)



8/18/78 Defendant, by counsel, files motion for continuance of pre-trial conference, c/s.

8/21/78 Defendant's motion for continuance of pre-trial Granted.

8/23/78 Pre-trial conference reset for Sept. 5, 1978 at 2:30 P.M. in Indianapolis, In.

9/13/78 Cause set for Jury Trial on Oct. 9, 1978, at 9:00 A.M. (SHD)

9/19/78 Defendant files proposed witness and exhibit lists.

9/5/78 Defendant's [sic] motion to strike Granted in part and Denied in part.

9/18/78 This matter came before the Court on plaintiffs' motion for production and defendants' motion to strike. Court having considered same, Defendants are directed to produce for plaintiffs each of the non-exempt portions of their central Inmate Files and the report of the Surgeon General's inspection of the T. H. Penitentiary Hospital. Further, if the Bureau of Prisons conducted an investigation into the death of T.H. Inmate Wm. Lowe and if the matter of said death is not in litigation, a copy of the findings of the investigation are to be produced for the use of the plaintiffs. All other requests made in plaintiff's motion are Denied. Defendant's motion to strike is sustained as indicated.

9/20/78 Approved pre-trial entry entered.

9/27/78 Plaintiffs file third amended complaint.

9/28/78 Defendants file answer to third amended complaint, 1st, 2nd, 3rd, 4th, 5th, and 6th defense, with memorandum in support of attachments thereto, c/s, with motion for judgment on the pleadings.

10/4/78 Trial date for this cause heretofore assigned for Oct. 9, 1978, is hereby VACATED.

11/3/78 Cause set for pre-trial on Nov. 27, 1978 at 9:30 A.M. (CJH)

12/1/78 Cause set for pre-trial on Dec. 18, 1978 at 4:00 P.M. (CJH)

12/15/78 Plaintiffs file motion for continuance of the pre-trial and to be removed from the current calendar. Patricia Handlin files appearance for plaintiffs, c/s. Court GRANTS motion for continuance from pre-trial and trial calendar

12/18/78 Plaintiffs file notice of taking of depositions of defendants Lockett, Marcades, [sic] Cleavinger, G.D. Wilson and Benson, and motion to take depositions by tape recorders, with affidavit thereto, c/s.

12/19/78 Jeffrey H. Haas files motion to withdraw as counsel of record for plaintiffs herein, c/s. Said motion APPROVED and said appearance is hereby withdrawn accordingly.

12/18/78 Plaintiffs, by counsel, file motion for continuance of the date set for filing of a response to the defendants' motion for a judgment on the pleading from Dec. 22, 1978 until the first week in January, 1979 with affidavit attached thereto, c/s.

12/19/78 Plaintiffs' motion for a continuance of date set for filing of a response to the defendants motion for a judgment on the pleadings from Dec. 22, 1978 until 1st week of January, 1979 (1/5/79) is GRANTED. This action in no-way affects any trial date that may have been set in this matter by the trial court.

1/4/79 Plaintiffs motion to take depositions by tape recorder GRANTED.

1/10/79 Plaintiffs file response to defendants motion for judgment on the pleadings, with memorandum in support of said motion and exhibit A attached thereto and response to defendants' motion to dismiss for failure to comply with an order of the Court, c/s.

1/26/79 Defendants file motion for protective order and response to motion for sanctions for failure to produce documents, c/s. Plaintiffs file first witness list and motion to compel production of defendants for deposition and for sanctions for failure to produce documents, c/s.



1/29/79 Plaintiffs file motion to substitute, c/s. Plaintiffs file response to defendants' motion for judgment on the pleadings, with memorandum in support of said response and exhibit A attached thereto, c/s. Plaintiffs file response to defendants' motion to dismiss for failure to comply with an order of this Court, c/s.

2/7/79 This cause came before the Court on plaintiffs' motion to substitute, Court having considered same, IT IS ORDERED that said motion is Granted and the corrected "Response to Defendants' Motion to Dismiss for Failure to Comply with an Order of this Court", plaintiffs' "Response to the Defendants' Motion for Judgment on the Pleadings", and plaintiffs' memorandum in support thereof, is hereby filed NUNC PRO TUNC, as of the date of the original pleadings were filed with the Court.

2/8/79 This cause came before the Court on plaintiffs' motion to compel production of defendants for deposition and for sanctions for failure to produce documents and defendants' motion for a protective order and response to motion for sanctions. Court having considered same; Defendants' motion for protective order is DENIED. Plaintiffs may notice any defendant for deposition at his city of usual residence on reasonable notice. Counsel are urged to cooperate in the scheduling of said depositions. Counsel may apply to the Court for relief in case of oppressive conduct. Plaintiffs' motion for sanctions is STAYED. Counsel for plaintiffs shall submit a request for the documents at issue with as much particularity as possible. Defendants shall reply stating whether such document exist and if they exist, why they are outside this Court's Entry of Sept. 18, 1978. Counsel for defendants shall submit such documents claimed to be outside this Court's Order to the Magistrate for in

camera inspection. The motion for attorney's fees and costs is DENIED.

2/27/79 Plaintiffs file notice to take depositions of defendants Marcadis, Wilson and Cleavinger, c/s.

3/5/79 Cause set for pre-trial on March 19, 1979 at 9:30 A.M. (JEN)

3/19/79 Deposition of defendant Marcades [sic] on March 3, 1979 consisting of 4 tapes, 7 sides, filed.

4/2/79 Defendants file summarized theories of the defense, counts 1 thru 12, c/s.

4/4/79 Plaintiffs file settlement demand and motion for leave to file amendments to complaint, c/s. Copy forwarded to U.S. Attorney.

4/9/79 Plaintiffs file motion for leave to file substituted amendment. Same forwarded to Magistrate Godich and copy forwarded to U.S. Attorney.

4/16/79 Defendants file supplemental authority on behalf of the defendants for consideration by the Court in connection with the defendants pending motion for judgment on the pleadings, with copy of opinion attached thereto, c/s.

4/25/79 Defendants file answer and supporting memorandum, c.s,

5/4/79 Defendants, by counsel, file witness and exhibit lists, c/s.

5/14/79 Plaintiffs file final witness list, c/s., and discovery request.

5/18/79 Defendants, by counsel, file first set of interrogatories to plaintiffs.

5/22/79 Approved pre-trial entry entered.

7/27/79 Cause set for pre-trial on August 29, 1979 at 2:15 P.M. (SHD)

8/3/79 This cause came before the Court on defendants' motion for judgment on the pleadings and plaintiffs' response thereto. Court having considered same, now Grants the motion in part and denies the motion in part. Accordingly, Court DISMISSES Count two and enters Judgment for defendants on counts One, Three, Five, Seven, Nine and Twelve. The action will go forward as to Benson Only on Count Four, as to Wilson only on Count Six, as to Benson Only on count eight, as to Wilson and Benson on Count Ten, and as to Benson Only on Count Eleven. The motion for leave to amend to sue defendants in their official capacities is denied, and the motion for leave to amend to claim punitive damages is Granted, as such leave should be freely granted.



8/27/79 Plaintiffs file motion for continuance of pre-trial conference and for removal of cause from the Oct. term trial calendar. Motion Granted as to pre-trial conference only and said pre-trial conference is continued. Plaintiffs file motion for leave to file motion for reconsideration and Court's Order dated Aug. 3, 1979.

8/30/79 Plaintiff's motion for continuance of trial date GRANTED.

8/31/79 Defendants file response to plaintiffs' motion for reconsideration of Court Order dated Aug. 3, 1979, c/s.

9/4/79 Plaintiffs' motion for reconsideration of Court Order dated August 3, 1979, or alternatively for certification for immediate appeal is DENIED in its entirety. Case is reassigned to the October 1979, trial calendar.

10/4/79 Plaintiffs file motion for continuance, with affidavit thereto, c/s. Motion GRANTED and said cause is continued from the Oct. 1979 trial calendar. Plaintiffs' counsel's attention is directed to Local Rule 6(c).

2/20/80 Cause set for pre-trial conference on February 28, 1980, at 9:00 A.M., T.H. (GEB)

5/6/80 Cause set for final pre-trial conference on June 2, 1980, at 9:00 A.M. Terre Haute.

6/2/80 Robert Kendall, JR., Gen. Lit. & Legal Advice Sect. Criminal Div., Dept. of Justice, Washington, D.C., 20530, files substitution of counsel for defendants, c/s.

9/3/80 Cause set for trial on Dec. 3, 1980, at 9:30 a.m., T.H.

12/1/80 Plaintiffs, by counsel, file motion for continuance of trial date, c/s.

12/9/80 Cause set for trial March 12, 1981 at 9:00 A.M. (GEB)

1/22/81 Cause set for pre-trial conference on Jan. 29, 1981 at 2:00 P.M. (GEB)

1/27/81 Pre-trial conference set for Jan. 29, 1981, at 2:00 P.M. continued.

3/12/81 The trial of said cause previously scheduled for March 12, 1981, is VACATED and same RESCHEDULED for trial on April 23, 1981, T.H.

4/7/81 Pltfs file motion for reconsideration of dismissal of defts Marcadis, Cleavenger [sic] and Lockett, with attachments thereto, c/s.

4/23/81 Defts file instructions Nos. 1 thru 40 and trial brief, c/s. same forwarded to E.V.

4/23/81 Comes now the parties herein and by their respective counsel and trial commenced. Voir dire examination commenced and completed. Opening statement of counsel heard. Evidence on behalf of pltfs commenced. At 5:10 P.M. pltfs orally move for separation of witness. Defts do not object. Motion Granted. Evidence on behalf of pltf resumed and continued. Court adjourned until April 24, 1981, at 9:00 A.M.

4/24/81 This matter came before the Court on pltfs' motion for reconsideration of dismissal of defts Marcadis, Cleavenger [sic] and Lockett. Parties have supplied the Court with Authority for their respective positions and Court having considered same, IT IS ORDERED that defts Marcadis, Cleavenger [sic] and Lockett be brought back into this litigation and pltfs' motion for reconsideration is GRANTED. The said defts will still be able to assert qualified good faith immunity as a defense.



4/24/81 Trial resumed. Evidence on behalf of pltfs is resumed and concluded. Pltfs rest. Outside the presence of the jury, defts move for directed verdict. Jury recalled. Evidence on behalf of defts commenced and concluded. Defts rest. Court adjourned until Monday, April 27, 1981, at 1:00 P.M. **Court Grants as to Deft Wilson in Count 6 and Grants as to Benson in Count 10. Court denies as to rest of defts and counts.

4/27/81 Trial resumed. Final arguments of counsel are heard. Instructions read to jury and jury retires to deliberate their verdict. Jury returns with verdicts as follows:

For deft Benson and against both pltfs.

For deft Wilson and against pltf Cain.

For both pltfs and against deft Cleavenger [sic] and assess compensatory damages in the sum of $1,500.00 and punitive and exemplary damages, none.

For both pltfs and against deft Marcadis and assess compensatory damages in the sum of $1,500.00 and punitive and exemplary damages, none.

For both pltfs and against deft Lockett and assess compensatory damages in the sum of $1,500.00 and punitive and exemplary damages, none.

Court Adjourned. S.E. O.B.Vol. 16, P. 2

4/28/81 Judgment entered in accordance with nine Jury Verdicts, S.E. O.B. Vol. 16, P. 3 (Entered 4/30/82) (case closed)

5/6/81 Entry heretofore entered on April 24, 1981, hereby corrected to-wit:

Trial resumed. Pltfs evidence resumed and concluded. Pltfs rest.

Outside the presence of the Jury, defts move for a directed verdict.

Court having reviewed the evidence, GRANTS motion of deft Wilson for directed verdict on Count 6 and GRANTS motion of deft Benson for directed verdict on Count 10. Jury re-

called. Defts evidence commenced and concluded. Defts rest. Court adjourned until Monday, April 27, 1981, at 1:00 P.M.

5/7/81 Defts file motion for judgment notwithstanding the verdict or in the alternative motion for a new trial, with memorandum of law in support of said motion, c/s. Same forwarded to E.V.

5/27/81 Pltfs file motion for atty fees and costs, affidavit of Atty Taylor, affidavit of Atty Handlin and bill of costs, c/s. Same forwarded to E.V.

6/3/81 Pltfs file response to defts' motion for judgment notwithstanding the verdict or alternatively, for a new trial, c/s. Same forwarded to E.V.

6/16/81 Defts, by counsel, file opposition to pltfs' motion for atty fees and costs, c/s. Same forwarded to E.V.

7/14/81 Hearing on motion for pltf's atty fees and deft's motion for amendment of judgment or, in the alternative, new trial. Arguments of counsel are heard. Court will rule on matter.

10/20/81 Pltfs file supplemental and amended motion for fees and costs, with exhibit A attached thereto, c/s. Same forwarded to E.V.

4/14/82 This matter came before the Court upon the motion of defts Marcadis Lockett and Cleavenger [sic] for a judgment notwithstanding the verdict or in the alternative, a motion for a new trial pursuant to Rules 50 and 59, F.R.C.P. Ct. having considered same, IT IS ORDERED that defts' motion for judgment notwithstanding the verdict is DENIED and defts' alternative motion for a new trial is DENIED. This matter also came before the Court upon pltfs' motion for attys fees and costs filed May 27, 1981, and its supplemental and amended motion for fees and costs filed Oct. 20, 1981; defts filed their opposition to any fees awards on June 16, 1981, and a hearing on said matters was held July 14, 1981. Ct. having considered same, IT IS ORDERED that pltfs' requests for atty fees are DENIED. S.E. O.B. Vol. 18, p. 78



5/13/82 Defendants file Notice of Appeal. Copy of NOTICE OF APPEAL, Information Sheet and Docket Entries forwarded to U.S. Court of Appeals, Chicago, Illinois. Copy of information sheet and Docket Entries forwarded to U.S. Attorney. Copy of Notice of Appeal, information sheet and docket entries forwarded to Court Reporter, Marjorie D. Cirrincone.

5/18/82 Plaintiffs file Notice of Cross Appeal, c/s. Filing fee paid. Copy of Notice of Cross-Appeal, Information Sheet and Docket Entries forwarded to U.S. Court of Appeals, Chicago, Illinois. Copy of same forwarded to U.S. Attorney and Robert Kendall, Jr.

5/25/82 Transcript on appeal consisting of 2 Volumes of pleadings forwarded to U.S. Court of Appeals, Chicago, Illinois.

5/28/82 Rec'd from Clerk, U.S. Court of Appeals, Court Order: The Court, *sua sponte* Orders as follows:

1. Appeals consolidated for purposes of briefing and oral argument.
2. Defts-appellants cross-appellees' opening brief and appendix shall be filed on or before July 5, 1982.
3. Pltfs-Appellees cross-appellants shall file combined responsive brief on the main appeal and opening brief and appendix on the cross-appeal on or before Aug. 4, 1982.
4. Deft-Appellants cross-appellees' reply brief, if any, and responsive brief and appendix on the cross-appeal, shall be filed on or before Sept. 3, 1982.
5. Pltfs-Appellees cross-appellants' reply brief, if any, on the cross-appeal shall be filed on or before Sept. 17, 1982.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. TH 75-47-C

DAVID SAXNER AND ALFRED CAIN, JR. PLAINTIFFS,

*v.*

CHARLES BENSON, T. CLEAVENGER[sic], M. MARCADIS, L. P. LOCKETT, AND G. D. WILSON, DEFENDANTS

**THIRD AMENDED COMPLAINT***

**I. INTRODUCTION**

1. Plaintiffs seek declaratory, injunctive, and monetary relief, challenging the illegal confinement in segregation units and other illegal punishments imposed upon them at the United States Penitentiary at Terre Haute, Indiana, by the defendants.

**II. JURISDICTION**

2. The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1331. This is an action to redress the deprivation of rights, privileges, and immunities secured by the First, Fourth, Fifth, Sixth, and Eighth Amendments to the United States Constitution. The amount in controversy for each plaintiff, exclusive of interest and costs, exceeds $10,000.

**III. PARTIES**

3. Plaintiff David Saxner is a citizen of Chicago, Illinois. He was incarcerated in the U.S. Penitentiary at Terre Haute, Indiana, from August 18, 1973, to April 25, 1975. He is a citizen of the United States.

4. Plaintiff Alfred Cain, Jr. is currently a citizen of New York, New York. He was incarcerated in the U.S. Penitentiary at Terre Haute, Indiana, from January 2, 1973, to December 12, 1975. He is a citizen of the United States.

*As amended at pre-trial conference held on November 18, 1977, in Terre Haute, Indiana.



5. Defendant Charles Benson was at all times pertinent the Warden of the U.S. Penitentiary at Terre Haute, Indiana, and was charged with the responsibility of administering that penitentiary.

6. Defendant T. Cleavenger was at times relevant to this complaint Associate Warden at the U.S. Penitentiary at Terre haute, Indiana, and served as chairman of the Institutional Disciplinary Committee (hereafter I.D.C.). The I.D.C. is charged with the responsibility of passing judgment on disciplinary charges which are lodged against prisoners at the U.S. Penitentiary at Terre Haute, Indiana, by staff members at that institution.

7. Defendant M. Marcadis was at times relevant to this complaint Lieutenant at the U.S. Penitentiary at Terre Haute, Indiana, and a member of the I.D.C. at that institution.

8. Defendant L. P. Lockett was at times relevant to this complaint chief of Classification and Parole at the U.S. penitentiary at Terre haute, Indiana, and a member of the I.D.C. at that institution.

9. Defendant G. D. Wilson was at times relevant to this complaint an Administrative Supervisor at the U.S. Penitentiary at Terre Haute, Indiana.

10. All defendants are sued in their individual capacities.

**IV. COUNT ONE**

11. Plaintiffs reallege paragraphs 1–10 as if fully set forth herein.

12. On February 21, 1975, Plaintiff Saxner was found guilty by the I.D.C. of charges of encouraging others to refuse to work, possession of contraband, and misuse of mails. As a result of these charges, Plaintiff Saxner was placed in administrative detention from February 14, 1975, until February 21, 1975, and in disciplinary segregation from February 21, 1975, until March 21, 1975, and eighty four days of good time was taken from him.

13. The charge of misuse of mails against Plaintiff Saxner arose from his distribution to members of the press of a manuscript concerning the death of a prisoner in the hospital at the U.S. Penitentiary at Terre Haute.

14. The charge of misuse of mails against Plaintiff Saxner and his subsequent conviction of this charge by the I.D.C. was in violation of Plaintiff Saxner's rights to freedom of speech and press, as guaranteed to him by the First Amendment to the U.S. Constitution.

## V. COUNT TWO

15. Plaintiffs reallege paragraphs 1–14 as is fully set forth herein.

16. On February 14, 1975, without any probable cause, Defendant G.D. Wilson searched Plaintiff Saxner's cell and seized numerous documents therein, to wit: a copy of a press release written by Plaintiff Saxner entitled "Prisoners at Terre Haute Seek an Investigation"; a letter written by Plaintiff Saxner to John Antonides, editor of a local Bloomington, Indiana, newspaper; notes taken by Plaintiff Saxner concerning conditions at the prison industries at the U.S. Penitentiary at Terre Haute; and copies of a press release written by Plaintiff Saxner regarding the death of William Lowe, previously a prisoner at the U.S. Penitentiary at Terre Haute.

17. This illegal search of Plaintiff Saxner's cell and seizure of Plaintiff Saxner's documents by Defendant Wilson violated rights guaranteed to Plaintiff Saxner by the Fourth Amendment to the U.S. Constitution.

## VI. COUNT THREE

18. Plaintiffs reallege paragraphs 1-17 as if fully set forth herein.

19. As a result of being charged with and convicted of the above listed disciplinary offenses by the I.D.C., Plaintiff Saxner was placed in G Block segregation unit at the U.S. Penitentiary at Terre Haute from February 21, 1975, to February 28, 1975, and lost eighty-four days of good time.

20. The conditions of confinement imposed by the defendants and their agents in G Block were markedly more restrictive than those in the general population at the U.S. Penitentiary at Terre Haute, in that:

a. Plaintiff was confined in his cell for twenty four hours per day, except for showers;

b. Plaintiff was allowed only one shower per week;



c. Plaintiff was not allowed any recreation;

d. Plaintiff was not allowed any commissary privileges;

e. Plaintiff had neither a blanket, a pillow, nor a spring bed;

f. There was no window in Plaintiff's cell;

g. There was no light in Plaintiff's cell for the first four and one hald [sic] days he spent there;

h. There was no air vent in Plaintiff's cell to regulate heat;

i. Writing material was rationed to Plaintiff;

j. Plaintiff was not allowed books or newspapers in his cell;

k. Plaintiff had no access to a law library or to other legal material;

l. Plaintiff was not allowed any personal hygiene items in his cell;

m. Plaintiff was not allowed to use a broom, a toilet brush, or cleanser to clean his cell;

n. The quantity of food available to Plaintiff at each meal was less than in general population;

o. Plaintiff was refused dental care;

p. Plaintiff was denied work opportunities which should have resulted in meritorous [sic] good time and pay;

q. Toilet paper was distributed to Plaintiff by the handful as needed;

r. Plaintiff was denied a visit from Rev. Robert Horton, who is an approved visitor for any federal prisoner.

21. As a result of being charged with and convicted of the above disciplinary offenses by the I.D.C., Plaintiff Saxner was placed in L Block segregation unit at the U.S. Penitentiary at Terre Haute from February 28, 1975, to March 21, 1975.

22. The conditions of confinement imposed by the defendants and their agents in L Block were markedly more restrictive than those in the general population at the U.S. Penitentiary at Terre Haute, in that:

a. Plaintiff was confined in his cell for twenty-four hours per day, except for showers;

b. Plaintiff was allowed only two showers per week;

c. Plaintiff was allowed to recreate only once or twice each week for forty-five minutes each time;

d. Plaintiff had access to only an inadequate law library;

e. The quantity of food available to Plaintiff at each meal was less than in general population;

f. Plaintiff was denied work opportunities which should have resulted in meritorious good time and pay.

23. These conditions of confinement imposed by Defendants and their agents and the loss of good time were severely punitive and resulted in the infliction of substantial grievous loss on Plaintiff Saxner.

24. Plaintiff Saxner was placed and held in G Block and L Block segregation units in violation of due process of law, in that:

a. Plaintiff Saxner received no written notice of the charges of possession of contraband and misuse of mails prior to his hearing before the I.D.C. on February 21, 1975.

b. Plaintiff Saxner was not confronted with any substantive evidence on any of the three charges of which he was found guilty by the I.D.C. on February 21, 1975.

c. Plaintiff Saxner's conviction for misuse of mails was in violation of Bureau of Prisons Policy Statement 1220.1A, dated February 11, 1972, entitled, "Inmate Correspondence with Representatives of the Press and News Media."

d. Plaintiff Saxner was not allowed to call witnesses in his own behalf, even though to have done so would have presented no threat to prison security.

25. Plaintiff Saxner's confinement in segregation and loss of good time as punishment for the above disciplinary convictions were in violation of his right to due process of law guaranteed him by the Fifth Amendment to the U.S. Constitution.

26. As a direct and proximate result of defendants' violation of plaintiff Saxner's Fifth Amendment rights, plaintiff suffered lost wages, anxiety, mental anguish, and psychological harm.

## VII. COUNT FOUR

27. Plaintiffs reallege paragraphs 1-26 as if fully set forth herein.

28. While confined in G Block segregation unit at the U.S. Penitentiary at Terre Haute as punishment for the above



disciplinary convictions, Plaintiff Saxner had no access to a law library or to legal material.

29. While confined in L Block segregation unit at the U.S. Penitentiary at Terre Haute, Plaintiff Saxner had access to only an inadequate law library.

30. Plaintiff Saxner's confinement in segregation as punishment for the above disciplinary convictions infringed on his right to access to the courts, guaranteed him by the Sixth Amendment to the U.S. Constitution.

31. As a direct and proximate result of defendant's violation of Plaintiff Saxner's Sixth Amendment rights as set forth above, Plaintiff Saxner suffered lost wages, anxiety, mental anguish, and psychological harm.

## VII. COUNT FIVE

32. Plaintiffs reallege paragraphs 1-31 as if fully set forth herein.

33. The severely punitive conditions of confinement imposed by the Defendants and their agents, the length of Plaintiff Saxner's confinement, and the loss of good time constituted cruel and unusual and disproportionate punishment in violation of Plaintiff Saxner's rights guaranteed him by the Eight [sic] Amendment to the U.S. Constitution.

34. As a direct and proximate result of defendants' violation of Plaintiff Saxner's Eight [sic] Amendment rights as set forth above, Plaintiff Saxner suffered lost wages, anxiety, mental anguish, and psychological harm.

## IX. COUNT SIX

35. Plaintiffs reallege paragraphs 1-34 as if fully set forth herein.

36. On February 14, 1975, without any probable cause, Defendant G.D. Wilson searched Plaintiff Cain's cell and seized numerous documents and publications therein.

37. This illegal search of Plaintiff Cain's cell and seizure of Plaintiff Cain's documents and publications by Defendant Wilson violated rights guaranteed to Plaintiff Cain by the Fourth Amendment to the U.S. Constitution.

38. As a direct and proximate result of defendant's violations of Plaintiff Cain's Fourth Amendment rights as set forth above, Plaintiff Cain suffered lost wages, detriment to

his educational progress, delay in the effective date of his parole, anxiety, mental anguish, and physical and psychological harm.

## X. COUNT SEVEN

39. Plaintiffs reallege paragraphs 1-38 as if fully set forth herein.

40. On February 21, 1975, Plaintiff Cain was found guilty by the I.D.C. of charges of encouraging others to refuse to work and possession of contraband. As a result of being charged with and convicted of the above disciplinary offenses by the I.D.C., Plaintiff Cain was placed in L Block segregation unit at the U.S. Penitentiary at Terre Haute from February 21, 1975, to March 21, 1975, and lost ninety six days of good time.

41. The conditions of confinement imposed by the Defendants and their agents in L Block on Plaintiff Cain were markedly more restrictive than those in the general population at the U.S. Penitentiary at Terre Haute, in that:

a. Plaintiff was confined in his cell for twenty-four hours per day, except for showers;

b. Plaintiff was allowed only two showers per week;

c. Plaintiff was allowed to recreate only once or twice each week for forty-five minutes each time.

d. Plaintiff had access to only an inadequate law library;

e. The quantity of food available to Plaintiff at each meal was less than in general population;

f. Plaintiff was denied work opportunities which would have resulted in meritorious good time and pay;

g. Plaintiff was unable to pursue his course of studies in a college program from Vincennes University and to maintain his creditable grade point average.

h. Plaintiff lost certain personal property, which has yet to be returned to him, to wit:

1. a SONY transistor radio;
2. approximately twenty books;
3. items of clothing;
4. certain legal material.

42. These conditions of confinement imposed by the Defendants and their agents were severely punitive and resulted in the infliction of substantial grievous loss on Plaintiff Cain.



43. Plaintiff Cain was placed and held in L Block segregation unit in violation of due process of law, in that:

a. Plaintiff Cain received no written notice of the charge of posssession of contraband prior to his hearing before the I.D.C. on February 21, 1975;

b. Plaintiff Cain was not confronted with any substantive evidence on either of the two charges on which he was found guilty by the I.D.C. on February 21, 1975.

44. Plaintiff Cain's confinement in segregation and loss of good time as punishment for the above disciplinary convictions were in violation of his right to due process of law guaranteed him by the Fifth Amendment to the U.S. Constitution.

45. As a direct and proximate result of defendants' violations of Plaintiff Cain's Fifth Amendment rights as set forth above, Plaintiff Cain suffered lost wages, detriment to his educational progress, delay in the effective date of his parole, anxiety, mental anguish, and physical and psychological harm.

## XI. COUNT EIGHT

46. Plaintiffs reallege paragraphs 1-45 as if fully set forth herein.

47. While confined in L Block segregation unit at the U.S. Penintentiary at Terre Haute, Plaintiff Cain had access to only an inadequate law library.

48. Plaintiff Cain's confinement in segregation as punishment for the above disciplinary convictions infringed on his right to access to the courts, guaranteed him by the Sixth Amendment to the United States Constitution.

49. As a direct and proximate result of defendants' violations of Plaintiff Cain's Sixth Amendment rights as set forth above, Plaintiff Cain suffered lost wages, detriment to his educational progress, delay in the effective date of his parole, anxiety, mental anguish, and physical and psychological harm.

## XII. COUNT NINE

50. Plaintiffs reallege paragraphs 1-49 as if fully set forth herein.

51. The severely punitive conditions of confinement imposed by the Defendants and their agents, the length of Plaintiff Cain's confinement, and the loss of good time constituted both cruel and unusual and disproportionate punishment, in violation of Plaintiff Cain's rights guaranteed him by the Eighth Amendment to the United States Constitution.

52. As a direct and proximate result of defendants' violations of Plaintiff Cain's Eighth Amendment rights as set forth above, Plaintiff Cain suffered lost wages, detriment to his educational progress, delay in the effective date of his parole, anxiety, mental anguish, and physical and psychological harm.

## XIII. COUNT TEN

53. Plaintiffs reallege paragraphs 1-10 as if fully set forth herein.

54. Between November 11, 1975, and November 24, 1975, Plaintiff Cain suffered the following deprivations as a result of conduct of the Defendants:

a. On November 11, 1975, without any provocation by Plaintiff Cain, defendant Wilson physically abused Plaintiff Cain, to wit: Defendant Wilson threw Plaintiff Cain against a wall, knocked Plaintiff Cain's eyeglasses to the ground, and punched Plaintiff Cain numerous times. At no time did Plaintiff Cain strike Defendant Wilson.

b. From November 13, 1975, to Novemer 24, 1975, Plaintiff Cain was placed on unit restriction by the Defedants.

55. While on unit restriction, Plaintiff Cain was subject to conditions of confinement which were markedly more restrictive than those in general population without unit restriction, in that:

a. Plaintiff was denied recreation;

b. Plaintiff was not allowed to attend meetings;

c. Plaintiff was denied access to the law library;

d. Plaintiff was denied access to the educational facilities;

e. Plaintiff was denied access to commissary.

56. These deprivations as a result of the conduct of the Defendants and their agents were severely punitive and resulted in the infliction of substantial grievous loss on Plaintiff Cain.



57. Plaintiff Cain suffered these deprivations in violation of due process of law, in that he was never charged with any disciplinary offense with regard to these events nor received a hearing of any kind with attendant procedural safeguards.

58. The deprivations suffered by Plaintiff Cain between November 11, 1975, and November 24, 1975, as a result of the conduct of the Defendants were in violation of his right to due process of law guaranteed him by the Fifth Amendment to the U.S. Constitution.

59. As a direct and proximate result of defendants' violations of Plaintiff Cain's Fifth Amendment rights as set forth above, Plaintiff Cain suffered lost wages, detriment to his educational progress, delay in the effective date of his parole, anxiety, mental anguish, and physical and psychological harm.

## XIV. COUNT ELEVEN

60. Plaintiffs reallege paragraphs 53-59 as if fully set forth herein.

61. The deprivations suffered by Plaintiff Cain between November 11, 1975, and November 24, 1975, as a result of the conduct of the Defendants constituted both cruel and unusual and disproportionate punishment, in violation of Plaintiff Cain's rights guaranteed him by the Eighth Amendment to the U.S. Constitution.

62. As a direct and proximate result of defendants' violations of Plaintiff Cain's Eighth Amendment rights as set forth above, Plaintiff Cain suffered lost wages, detriment to his educational progress, delay in the effective date of his parole, anxiety, mental anguish, and physical and psychological harm.

## XV. COUNT TWELVE

63. Plaintiffs reallege paragraphs 1-62 as if fully set forth herein.

64. At all times Defendant Benson was aware of Plaintiffs' illegal and unconstitutional confinement and yet refused to allow plaintiffs to be released from such segregation.

65. As a direct and proximate result of Defendant Benson's failure to release Plaintiffs from the illegal confinement, Plaintiffs suffered violation of their First, Fourth, Sixth and Eighth Amendment constitutional rights, including physical and psychological harm.

**XVI. RELIEF**

WHEREFORE, Plaintiffs pray that this court:

A. Order that Plaintiff Cain be compensated for any and all personal property seized from Plaintiff Cain.

B. Order that Plaintiffs be compensated for the back wages not earned because of the illegal conduct of the Defendants and their agents.

C. Order that Defendants compensate Plaintiff Cain for one new pair of eyeglasses.

D. Order that Plaintiff Saxner be awarded thirty five thousand dollars ($35,000) and Plaintiff Cain be awarded forty thousand dollars ($40,000) to compensate them for anxiety, mental anguish, physical and psychological harm, and detriment to educational progress.

E. Order such other and further relief as this court deems just, proper, and equitable.

Respectfully submitted,

/s/ _____

MICHAEL DEUTSCH
110 S. Dearborn, Room 707
Chicago, Illinois 60603
312/236-3504
*Attorney for Plaintiffs*

Plaintiffs demand trial by jury.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

Case No. TH 75-47-C

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DAVID SAXNER AND ALFRED CAIN, JR., PLAINTIFFS

*vs.*

CHARLES BENSON, ET AL., DEFENDANTS

---

**ORDER**

This matter is before the Court upon Plaintiffs' Motion for Reconsideration of Dismissal of Defendants Marcadis, Cleavenger [sic], and Lockett. The parties have supplied the Court with authority for their respective positions.

The Defendants Cleavenger [sic], Marcadis, and Lockett were initially dismissed from this action when the holding in *Butz* v. *Economou*, 434 U.S. 478 (1978) was extended to grant absolute immunity to the members of the Institution Discipline Committee (I.D.C.) which was made up of the above three Defendants in this case. Since the Court's ruling, the United States Circuit Court of Appeals for the Seventh Circuit in *Mary and Crystal* v. *Gerald Ramsden et al*, Nos. 78-1954 and 78-1955 (7th Cir. Nov. 21, 1980), held that the I.D.C. at a Wisconsin juvenile correctional institution was not entitled to absolute immunity under the doctrines espoused in *Butz* v. *Economou*, *supra*. The Court stated:

> We think this function of imposing discipline more similar to that of the school board members in *Wood* v. *Strickland*, 420 U.S. 308 (1975) than to that of a judge.

While the I.D.C. members at a federal prison may perform more functions similar to that of a judge than I.D.C. members at a Wisconsin juvenile federal correctional institution, the Seventh Circuit's holding as stated above shows a general inclination on the part of the appellate courts of the country not to extend absolute immunity doctrine to members of I.D.C.'s. Consequently, the Court finds that Defend-

ants Cleavenger [sic], Marcadis, and Lockett should be brought back into this litigation and Plaintiff's Motion for Reconsideration is hereby GRANTED. The above three Defendants will still be able to assert qualified good faith immunity as a defense.

IT IS SO ORDERED

DATED at Terre haute, Indiana this 24th day of April, 1981.

/s/ _____

GENE E. BROOKS,
*Judge*
United States District Court
Southern District of Indiana

COPIES TO:

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ROBERT KENDALL
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Criminal Division
U.S. Department of Justice
Washington, D.C. 20530



BUREAU OF PRISONS
WASHINGTON, D.C. 20537

**POLICY STATEMENT**

7400.5C

SUBJECT: INMATE DISCIPLINE

10-4-74

1. *PURPOSE*. This statement of policy is to assure that inmate discipline and control are fully consonant with the correctional objectives of the institution, the focus being on (a) individual inmate adjustment to the programs, behavior standards, and limitations necessarily imposed by the administration; (b) the general welfare and safety of the institutional community; and, (c) the incorporation of due process standards for inmate disciplinary hearings as prescribed by the Supreme Court in *Wolff v. McDonnell*, ___U.S. ___, 94 Ct. 2963, ___ L.Ed 2d ___ (1974).

2. *DIRECTIVES AFFECTED*. Policy Statements 7400.5B and 7400.6A are superceded.

3. *POLICY*. It is the policy of the Federal Bureau of Prisons to maintain an institutional climate in all of its facilities so that every inmate may complete his term of confinement with a minimum of corrosive effect and a maximum gain in his ability to more adequately maintain a successful community adjustment following release. In order that the majority of inmates might live in a safe and orderly environment, it is necessary that those individuals whose behavior is in noncompliance with institution rules be brought to the attention of the appropriate authorities.

Disciplinary action is but one factor in correctional treatment and control. There are other individualized correctional programs and goals that shall be given consideration by the administration. The objective of this approach is the future voluntary acceptance of institution regulations which are required for the general welfare of the institution community and serve as an aid to law-abiding behavior following release.

4. *ACTION*. A single Institution Discipline Committee will be established in each Bureau of Prisons Institution. The Committee will be composed of at least three (3) members, of whom two (2) will be of department head level or above; the Chairman will be of the level of department head or above. This requirement as to the level of members will not apply to Community Treatment Centers or Camps.

The Chief Executive Officer of each institution will delegate to the Institution Discipline Committee the authority to order an inmate placed or retained in disciplinary segregation, to order the witholding or forfeiture of good time, and to order an inmate transferred for disciplinary reasons. The authority to impose sanctions other than disciplinary segregation, withholding or forfeiture of good time and transfer for disciplinary reasons will be lodged in such person or persons as the Chief Executive Officer may direct. Where the institution has a unit management system, the authority to impose these lesser sanctions will be delegated to staff members in the inmate's unit.

Each institution having the need for facilities to house inmates separate from the general population will establish special housing units consisting of two types: Administrative Detention and Disciplinary Segregation.

An inmate may be placed in Administrative Detention where his attitude and conduct indicate that his continued presence in the general population poses a serious threat to life, property, himself, staff, other inmates or to the security of the institution, and where the inmate:

(a) Is pending a hearing for a violation of institution rules or regulations;

(b) Is pending an investigation of a violation of institution rules or regulations;

(c) Is pending investigation or trial for a criminal act:

(d) Requests admission to the administrative detention area for his own protection; or

(e) Is in holdover status during transfer;

(f) Pending classification.

An inmate may be placed in disciplinary segregation where his continued presence in the general population



poses a serious threat to himself, staff, or other inmates or to the security of the institution and where the Institution Discipline Committee directs following a hearing conducted in accordance with the limited due process requirements as outlined in paragraph 9 of this policy statement in which the inmate has been found to have committed a serious violation of institution rules or regulations.

5. *GENERAL PRINCIPLES*. The following general principles shall be applicable in every disciplinary action taken:

(a) Disciplinary action shall be taken at such times and in such measures and degree as is necessary to regulate an inmate's behavior within acceptable limits;

(b) Inmate behavior shall be controlled in a completely impartial and consistent manner;

(c) Disciplinary action shall not be capricious, retaliatory, or for the purpose of revenge.

(d) Corporal punishment of any kind is strictly prohibited.

(e) Accurate, detailed reports of disciplinary actions shall be maintained in accordance with the requirements of this policy statement.

6. *INFORMATION TO INMATES*. Each inmate is to be advised in writing at the time of arrival at an institution of:

(a) His rights and responsibilities;

(b) Acts prohibited in the institutions;

(c) The types of disciplinary action which may be taken; and

(d) The disciplinary system within the institution.

This information will be provided in booklet or pamphlet form as part of the admission orientation program. A signed receipt will be obtained from each inmate acknowledging that he has received a copy of the booklet or pamphlet.

## (e) Rights and Responsibilities

| RIGHTS | RESPONSIBILITIES |
|---|---|
| 1. You have the right to expect that as a human being you will be treated respectfully, impartially, and fairly by all personnel. | 1. You have the responsibility to treat others, both employees and inmates, in the same manner. |
| 2. You have the right to be informed of the rules, procedures, and schedules concerning the operation of the institution. | 2. You have the responsibility to know and abide by them. |
| 3. You have the right to freedom of religious affiliation, and voluntary religious worship. | 3. You have the responsibility to recognize and respect the rights of others in this regard. |
| 4. You have the right to health care which includes nutritious meals, proper bedding and clothing, and a laundry schedule for cleanliness of the same, an opportunity to shower regularly, proper ventilation for warmth and fresh air, a regular exercise period, toilet articles and medical and dental treatment. | 4. It is your responsibility to not waste food, to follow the laundry and shower schedule, to maintain neat and clean living quarters, and to seek medical and dental care as you may need it. |
| 5. You have the right to visit and correspond with family members, and friends, and correspond with members of the news media in keeping with the facility rules and schedules. You also have a right to uncensored and uninspected out going correspondence with members of the news media through the Prisoners' Mail Box System. Letters forwarded to the news media through PMB are subject to the regulations of that System. | 5. It is your responsibility to conduct yourself properly during visits, to not accept or pass contraband, and to not violate the law through your correspondence. |
| 6. You have the right to unrestricted and confidential access to the courts by correspondence (on matters such as the legality of your conviction, civil matters, pending criminal cases, and to conditions of your imprisonment). | 6. You have the responsibility to present honestly and fairly your petitions, questions, and problems to the court. |



| | |
|---|---|
| 7. You have the right to legal counsel from an attorney of your choice by interviews and correspondence. | 7. It is your responsibility to use the services of an attorney honestly and fairly. |
| 8. You have the right to participate in the use of law library reference materials to assist you in resolving legal problems. You also have the right to receive help when it is available through a legal assistance program. | 8. It is your responsibility to use these resources in keeping with the procedures and schedule prescribed and to respect the rights of other inmates to the use of the material. |
| 9. You have the right to a wide range of reading material for educational purposes and for your own enjoyment. These materials may include magazines and newspapers sent from the publishers. | 9. It is your responsibility to seek and utilize such materials for your personal benefit, without depriving others of their equal rights to the use of this material. |
| 10. You have the right to participate in education, vocational training, and employment as far as rescources are available, and in keeping with your interests, needs, and abilities. | 10. You have the responsibility to take advantage of activities which may help you live a successful and law abiding life within the institution and in the community. You will be expected to abide by the regulations governing the use of such activities. |

### (f) *Prohibited Acts in Federal Penal and Correctional Institutions*

| | |
|---|---|
| 001 | Killing |
| 002 | Assaulting any person |
| 003 | Fighting with another person |
| 004 | Threatening another with bodily harm, or with any offense against his person or his property |
| 005 | Extortion, blackmail, protection: demanding or receiving money or any thing of value in return for protection against others, to avoid bodily harm, or under threat of informing |
| 051 | Engaging in sexual acts with others |
| 052 | Making sexual proposals or threats to another |
| 053 | Indecent exposure |
| 101 | Escape |
| 102 | Attempting or planning escape |
| 103 | Wearing a disguise or mask |
| 151 | Setting a fire |

152 Destroying, altering, or damaging government property, or the property of another person
153 Stealing (theft)
154 Tampering with or blocking any locking device
155 Adulteration of any food or drink
201 Possession or introduction of an explosive or any ammunition
202 Possession or introduction of a gun, firearm, weapon, sharpened instrument, knife, or unauthorized tool
203 Possession, introduction, or use of any narcotics, narcotic paraphernalia, drugs, or intoxicants not prescribed for the individual by the medical staff
204 Misuse of authorized medication
205 Possession of money or currency, unless specifically authorized
206 Possession of property belonging to another person
207 Loaning of property or anything of value for profit or increased return
208 Possession of any thing not authorized for retention or receipt by the inmate, and not issued to him through regular institutional channels
209 Possessing any officer's or staff clothing
210 Possessing unauthorized clothing
211 Mutilating or altering clothing issued by the government
251 Rioting
252 Encouraging others to riot
253 Engaging in, or encouraging, a group demonstration
254 Refusing to work, or to accept a program assignment
255 Encouraging others to refuse to work or participate in work stoppage
256 Refusing to obey an order of any staff member
257 Violating a condition of furlough
301 Unexcused absence from work, or any assignment
302 Malingering, feigning an illness
303 Failing to perform work as instructed by a supervisor
304 Insolence towards a staff member
305 Lying or providing a false statement to a staff member
306 Conduct which disrupts or interferes with the security or orderly running of the institution



351 Counterfeiting, forging, or unauthorized reproduction of any document, article of identification, money, security, or official paper
401 Participating in an unauthorized meeting or gathering
402 Being in an unauthorized area
451 Failure to follow safety or sanitation regulations
452 Using any equipment or machinery which is not specifically authorized
453 Using any equipment or machinery contrary to instructions or posted safety standards
501 Failing to stand count
502 Interfering with the taking of count
551 Making intoxicants
552 Being intoxicated
553 Smoking where prohibited
554 Using abusive or obscene language
601 Gambling
602 Preparing or conducting a gambling pool
603 Possession of gambling paraphernalia
651 Being unsanitary or untidy: failing to keep one's person and one's quarters in accordance with posted standards
652 Tattooing or self-mutilation
701 Unauthorized use of mail or telephone
702 Unauthorized contacts with the public
703 Correspondence or conduct with a visitor in violation of posted regulations
751 Giving or offering any official or staff member a bribe, or anything of value
752 Giving money or any thing of value to, or accepting money or any thing of value from; another inmate, a member of his family, or his friend
801 Attempting to commit any of the above offenses, aiding another person to commit any of the above offenses, and making plans to commit any of the above offenses shall be considered the same as a commission of the offense itself.

7. *INCIDENT REPORT AND INVESTIGATION.*

(a) *Incident Report:* Informal resolution of incidents involving violations of institution rules or regulations is encouraged. However, where an employee witnesses or has a reasonable belief that a violation of institution rules or regulations has been committed by an inmate, and where the employee deems that informal resolution of the incident is unwarranted, the employee shall prepare an incident report and forward it to the appropriate correctional supervisor. The appropriate correctional supervisor may informally dispose of the incident report or forward the incident report for further disposition consistent with this policy statement.

The reporting employee should complete Part 1 of the incident report immediately. The incident is to be one of the Prohibited Acts listed in paragraph 6(f) of this policy statement. The entire language of the Prohibited Act(s) does not have to be copied. Only the relevant portion need be used. example, "Destroying Government Property, Code No. 152," "Possessing narcotics, Code No. 801" would be acceptable listings for appropriate charges.

The description of the incident should contain the details of the activity which is being reported. All facts about the incident which are known by the employee should be recorded. If there is anything unusual about the inmate's behavior, this should be noted. The reporting employee should also list any staff or inmate witnesses to the incident, and the disposition of any physical evidence (weapons, property, and etc.) which the employee may have personally handled. The reporting employee will sign the report and indicate his title in the appropriate blocks. The incident report should then be forwarded to the appropriate correctional supervisor for disposition.

(b) *Investigation:* The investigation should be conducted within 24 hours of appointment of the investigator, unless circumstances beyond the control of the investigator intervene. The investigating officer should ordinarily be an employee of supervisory level and may



not be the employee reporting the particular incident in question. Where it appears likely that the incident may be the subject of a criminal prosecution, investigation should be suspended and the inmate should not be questioned until the FBI interviews have been completed. (See Policy Statement 2200.1.)

Ordinarily, an inmate will be given a copy of the incident report by the investigating officer at the beginning of the investigation. If the investigation is delayed for any reason, any employee may deliver the charges to the inmate. The date and time the inmate receives a copy of the Incident Report will be noted. This should be done within eight (8) hours from the time the investigator received his assignment, unless there are exceptional circumstances which prevent it. The investigator should also read the charges to the inmate and obtain his statement concerning the incident, except as provided above. Comment about the inmate's attitude may be included here.

The investigator should then thoroughly investigate the incident. He should talk to witnesses, and summarize their statements. The disposition of evidence should be recorded. Often, he will want to talk to the reporting employee to obtain his report first hand and to clarify any questions the investigator may have. All steps and actions taken should be recorded on the incident report.

Under Comments and Conclusions, the investigator may include his comments on the inmate's prior record and behavior, his analysis of any conflicts between witnesses, and his conclusions of what in fact happened. The inmate does not receive a copy of the investigation. However, should the case ultimately be forwarded to the Institution Discipline Committee, the investigation should be given to the inmate's staff representative for use in presentation on the inmate's behalf.

8. *MINOR DISPOSITIONS.* The Chief Executive Officer of each institution shall delegate to such persons he selects the authority to impose minor dispositions and sanctions for violations of institution rules or regulations. Where the institution has a unit management system, the authority to

impose minor dispositions and sanctions shall be delegated to staff member of an inmate's unit. Minor dispositions and sanctions are those actions imposed for violation of institution rules or regulations other than segregation, withholding or forfeiture of good time, and transfer for disciplinary reasons. While the process by which minor dispositions are imposed is left to the discretion of the Chief Executive Officer of each institution, the following minimum standards will apply throughout the Bureau of Prisons:

(a) Each inmate charged with violating an institution rule or regulation shall be given a written copy of the charge or charges against him within 24 hours of the infraction.

(b) Each inmate so charged will be entitled to a hearing held within 48 hours (excluding weekends and holidays) of the incident to consider the charge brought against him.

(c) The inmate will be entitled to be present at the hearing except during deliberations of the decision maker and where institutional security would be jeopardized. The reasons for excluding an inmate from the hearing must be well documented in the record.

(d) The inmate will be afforded the opportunity to make a statement and to present documentary evidence in his own behalf.

(e) The inmate will be given a written copy of the decision and disposition. Review of any action taken as a minor disposition will be pursuant to the Administrative Remedy Procedure, Policy Statement 2001.6A.

(f) Where an alleged violation of institution rules or regulations warrants consideration for other than minor sanction, the charge may be referred to the Institution Discipline Committee for hearing and disposition. Copies of all relevant documents should be forwarded to the Chairman of the Institution Discipline Committee with a brief statement of reasons for the referral along with any recommendations for appropriate disposition should the inmate be found to have committed the act charged.

(g) When charges are to be referred to the Institution Discipline Committee, the inmate shall be advised of



the rights afforded at a hearing before the Institution Discipline Committee. He shall be asked to indicate his choice of staff representative and the names of any witnesses he wishes to be called to testify on his behalf at the hearing. (A sample form that may be used for this purpose is attached to this policy statement. Time limits imposed in this section may be extended for good cause.)

(h) Where the person or persons delegated the authority to impose minor dispositions determines that the inmate is innocent of committing any prohibited act, the inmate's file shall be expunged of the incident report lodged against him.

9. *INSTITUTION DISCIPLINE COMMITTEE.*

(a) *Composition:* The Chief Executive Officer may appoint as many members to the Institution Discipline Committee as he deems appropriate. No fewer than three members, including the Chairman, must be present at any hearing to constitute a quorum. The Chairman and no less than one member present at the hearing will be of the department head level or higher. The third member of the Committee need not be of department head level. For the purposes of this section, "department head" includes acting department head. This requirement as to the level of staff members and Chairman will not apply to Community Treatment Centers or Camps. In order to insure impartiality, a staff member may not sit as a member of the Institution Discipline Committee if he reported or investigated the incident of rules infraction being considered. Ordinarly a staff member witnessing an incident under consideration should not sit as a member of the Institution Discipline Committee. However, a staff member witnessing an incident may sit as a member of the Institution Discipline Committee where the incident is so widely witnessed that virtually every staff member has witnessed it in whole or part. Likewise, a staff member may not sit as a member of the Institution Discipline Committee if he played any signifcant part in having the charges referred to the Institution Discipline Committee for consideration. The Chief Executive Officer should appoint

members to this Committee who are broadly representative of the primary areas of institutional administration and who are fully knowledgeable of the requirements of this policy statement and of the functions of Inmate Discipline.

(b) *Functions:* The Institution Discipline Committee shall conduct hearings, make findings, and may impose appropriate sanctions on incidents of inmate misconduct referred to it for disposition in accordance with the due process standards as listed below. While this Committee may impose any lesser sanctions available, only this Committee will have the authority to order: (1) an inmate placed in disciplinary segregation, (2) an inmate's good time withheld or forfeited, or (3) an inmate transferred to another institution for disciplinary reasons. This Committee will also conduct reviews of inmates placed in disciplinary segregation in accordance with requirements listed below.

(c) *Procedural Requirements:* An inmate may not be placed in disciplinary segregation, or have his good time withheld or forfeited, or be transferred to another institution for disciplinary reasons unless there has been a fact-finding hearing before the Institution Discipline Committee in which the following procedures have been satisfied:

(1) An inmate will be given advance written notice of the charge(s) against him no less than 24 hours before his appearance before the Institution Discipline Committee. An inmate may waive in writing this 24 hour notice requirement.

(2) An inmate will be provided the service of a full-time staff member to represent him at the hearing before the Institution Discipline Committee should he so desire. The Chairman shall arrange for the presence of a selected staff representative. If the staff member selected declines or is unavailable because of absence from the institution, the inmate should be given the options of selecting another representative, or in the case of an absent staff member, of waiting a reasonable period for his return, or continuing the hearing without a staff representative. A staff representative should be given adequate time to speak with the inmate and interview requested witnesses where appropriate. While it is expected that a staff member will have had ample time to prepare prior to the hearing, delays in the hearing to allow for adequate preparation may be ordered by the Chairman of the Institution Discipline Committee.



(3) An inmate will be permitted to have witnesses called and to present documents in his behalf, provided the calling of witnesses or the disclosure of documentary evidence would not jeopardize or threaten institutional security. The Chairman will call those witnesses he deems reasonably available and necessary for an appreciation of the circumstances surrounding the charge. Repetitive witnesses need not be called. Unavailable witnesses may be asked to submit written statements. Reasons for declining to call requested witnesses will be documented in the Committee's report. Witnesses requested by the inmate who are called should be questioned by his staff representative or where staff representation has been waived, by members of the Committee. Inmates who have waived the services of a staff representative may submit questions for requested witnesses in writing to the Committee.

(4) The Institution Discipline Committee will prepare a record of its proceedings which need not be verbatim. This record must be sufficient to document the advisement of inmate rights, the Committee's findings, the Committee's decision, the specific evidence relied on by the Committee, and a brief statement of the reasons for the sanctions imposed. The evidence relied upon for the decision and the reasons for the actions taken should be set out in specific terms unless doing so would jeopardize institutional security. (A sample form that may be used to advise an inmate of his rights at an Institution Discipline Committee hearing is attached to this policy statement.)

(5) An inmate will be permitted to be present throughout the Institution Discipline Committee hearing except during deliberations of the Committee and except where institutional security would be jeopardized. The reasons for excluding an inmate from the hearing must be well documented in the record. A hearing may be conducted in the absence of an inmate where the inmate refuses to appear and he cannot be brought to the hearing without the use of force. When an inmate escapes from custody, the Institution Discipline Committee will conduct a hearing in the inmate's absence at the institution from which the escape occurred. When an inmate who has had sanctions imposed (such as loss of good time) while absent from custody, returns to custody, he will be advised of his right to have the escape charge brought before the Institution Discipline committee at the institution where he returned to custody. All the procedural requirements of Institution Discipline Committee hearings will apply to this rehearing except written statements of witnesses not readily available may be liberally used instead of live witnesses. The Institution Discipline Committee, upon rehearing, may dismiss the charge, or may modify but may not increase the sanctions previously imposed in the inmate's absence.

(d) *Dispositions of the Institution Discipline Committee:* The Institution Discipline Committee shall have available a broad range of sanctions and dispositions. These dispositions and sanctions will include the following:

The Institution Discipline Committee may

(1) Dismiss any charge(s) before it where appropriate and shall order the record of charges expunged where the inmate has been determined innocent of the charge(s).

(2) Impose sanctions and dispositions available to the person or persons designated to impose minor dispositions.



(3) Direct that an inmate be placed or retained in disciplinary segregation pursuant to guidelines contained in this policy statement.

(4) Direct that an inmate's good time be withheld. Withholding of good time should be limited to misconduct or offenses; it should not be applied as a universal punishment to all persons in disciplinary segregation status. Withholding shall be limited to the good time creditable for the single month during which the violation occurs. (Some offenses, such as refusal to work at an assignment, may be recurring, and thus may permit consecutive withholding actions.) Withheld good time may be considered for restoration at any time.

(5) Direct that an inmate's good time be forfeited. The good time available for forfeiture is limited to an amount computed by multiplying the number of months served at the time of the offense for which forfeiture action is taken, by the applicable monthly rate specified in 18 United States Code, Section 4161 (less any previous forfeiture or withholding outstanding), plus extra good time which may have been earned to the date of the offense. All or part of an inmate's accumulated good time may be forfeited. Authority to restore all types of forfeited and withheld good time is delegated to the Institution Discipline Committee of each institution. Forfeited good time may be considered for restoration at any time.

(6) Direct that an inmate be transferred to another institution for disciplinary reasons. Where a present or impending emergency requires immediate action, an inmate may be transferred prior to an Institution Discipline Committee hearing. However, a hearing before the Institution Discipline Committee at the receiving institution must be conducted as soon as practicable under the circumstances to consider the factual basis of the charge of misconduct and the reasons for the emergency transfer. Transfers for disciplinary reasons prior to a hearing before the Institu-

tion Discipline Committee are to be used only in emergency situations and only with the approval of the receiving Regional Director. However, when an inmate is transferred under these circumstances, the sending institution will forward copies of incident reports with completed investigation to the receiving institution for purposes of the hearing before the receiving institution's Institution Discipline Committee. All procedural requirements applicable to Institution Discipline Committee hearings contained in paragraph 9 (c) of this policy statement will be utilized, except written statements of unavailable witnesses may be liberally accepted instead of live testimony.

(7) Suspend the execution of any sanction it imposes.

(e) *Criminal Prosecutions:* Where an inmate's misconduct may also be the subject of a criminal prosecution, it is not necessary to await the outcome of the criminal trial before taking disciplinary action, especially if there is reason to believe there will be a long delay before the trial is held. An inmate under investigation of the FBI or other law enforcement officers for an offense committee in the institution may not be questioned about the charge until the FBI interviews are completed. An inmate who is the subject of criminal prosecution for institutional violations will not be transferred from the jurisdiction of the trial court without the consent of the appropriate United States Attorney or the Court in which the trial is pending.

10. *APPEALS FROM INSTITUTION DISCIPLINE COMMITTEE ACTIONS.* At the time the Institution Discipline Committee gives an inmate notice of its decision, the Committee will also advise the inmate that he may appeal the Committee's decision to the Chief Executive Officer. Appeals must be filed no later than thirty (30) days after notice of the decision. This time limit may be extended for good cause shown. An inmate wishing to appeal any disciplinary action imposed as a result of a hearing before the Institution



Discipline Committee must use the procedures and forms provided for by Policy Statement 2001.6A (Administrative Remedy of Complaints Initiated by Offenders in Bureau of Prisons Facilities). The Chief Executive Officer may approve, modify, or reverse any disciplinary action of the Institution Discipline Committee as he deems appropriate. This authority may not be delegated. The Chief Executive Officer may not increase the amount of forfeiture imposed.

An inmate may appeal an adverse decision of the Chief Executive Officer through the appeal procedures contained in Policy Statement 2001.6A to the appropriate Regional Director. Appeals to the Regional Director from adverse decisions from the Chief Executive Officer must be filed no later than thirty (30) days from the date of the Chief Executive Officer's decision.

Additionally, appeals of adverse decision from the Regional Director may be made to the Assistant Director, General Counsel and Review within thirty (30) days of the decision from the Regional Director.

On appeal the following factors will be considered:

(a) Was there substantial compliance with the Policy Statement on Inmate Discipline?

(b) Was the decision of the Institution Discipline Committee based on substantial evidence?

(c) Under the circumstances, was the sanction imposed disproportionate to the offense?

11. *SPECIAL HOUSING UNITS.* Each institution having the need for facilities to house inmates separate from the general population will establish special housing units consisting of two types: Administrative Detention and Disciplinary Segregation. (Some institutions may also have a facility for long-term control unit programs—see Policy Statement 7300.80.) Special Housing Units will be maintained in accordance with the policies and procedures contained in this policy statement.

(a) *Administrative Detention:* Administrative Detention is the status of confinement which results in a loss of some privileges which the inmate would have if assigned to the general population. Administrative Deten-

tion is to be used only where the continued presence of the inmate in general population poses a serious threat to life, property, himself, other inmates, staff members or the security of the institution.

(1) *Placement in Administrative Detention:* An inmate may be placed in Administrative Detention by persons designated by the Chief Executive Officer. These persons may be correctional supervisors, shift supervisors or members of an inmate's unit or team. An inmate may be placed in Administrative Detention for any of the following reasons:

a. Pending a hearing for a violation of institution rules or regulations;

b. Pending an investigation of a possible violation of an institution rule, but where charges have yet to be lodged;

c. Pending investigation or trial for crimes committed in the institution;

d. An inmate requests admission to the Administrative Detention area for his own protection;

e. An inmate in holdover status awaiting transfer; or

f. Pending classification.

A memorandum detailing the reason for placing an inmate in Administrative Detention will be prepared and given to members of the inmate's unit or team, with a copy to the Operations Supervisor of the Administrative Detention Unit. A copy of this memorandum will also be given to the inmate provided institutional security is not thereby compromised.

(2) *Review of Inmates Housed in Administrative Detention:* The Chief Executive Officer shall designate such person or persons he deems appropriate to review the status of inmates housed in Administrative Detention. Normally the Operations Supervisor of the Administrative Detention unit or members of



the inmate's unit or team should be delegated this authority. Initial placement shall be accomplished by means of a memorandum detailing the reasons for this action. Thereafter, the reviewing authority will review the status of each inmate at least once a week. The reviewing authority will formally review each inmate who spends ten (10) continuous days in Administrative Detention, and thereafter such cases will be formally reviewed at least every 30 days. The inmate shll appear before the reviewing authority at such formal reviews unless the inmate refuses to appear without the use of force. Administrative Detention is to be used only for short periods of time except where an inmate needs long-term protection. An inmate may be kept in Administrative Detention for long-term protection where the need for such protection is well documented. Inmates shall be released when the reason for their initial placement ceases to exist or where their return to general population would no longer pose a serious threat to themselves, to staff or other inmates or the security of the institution.

(3) *Conditions of Administrative Detention:* The basic level of conditions as described below for Disciplinary Segregation will also apply to Administrative Detention. To the extent possible, inmates housed in Administrative Detention will be afforded the same general privileges given to inmates in general population as is consistent with existing resources available and the security needs of the unit. Unless there are compelling reasons to the contrary, institutions should provide commissary privileges, reasonable amounts of personal property, and exercise periods exceeding those provided for inmates housed in Disciplinary Segregation. Visiting and correspondence privileges of the general population should be given inmates in Administrative Detention.

(b) *Disciplinary Segregation:* Disciplinary Segregation is the status of confinement of an inmate housed in an individual cell either by himself or with other in-

mates, separated from the general population, as a result of a hearing before the Institution Discipline Committee in which the inmate has been found to have committed a prohibited act. Inmates housed in Disciplinary Segregation will have significantly fewer privileges than those housed in Administrative Detention. Disciplinary Segregation is to be used only where other available dispositions are inadequate to regulate an inmate's behavior within acceptable limits and where the inmate's presence in the general population poses a serious threat to life, property, to himself, staff or other inmates or the security of the institution.

(1) *Placement in Disciplinary Segreation:* An inmate may be placed in Disciplinary Segregation only by direction of the Institution Discipline Committee following a hearing in which the inmate has been found to have committed a serious act of misconduct which warrants this serious sanction. Inmates found to have committed serious acts of misconduct should not be placed in Disciplinary Segregation unless their presence in general population would pose a serious threat to staff or other inmates or to the security of the institution.

(2) *Review of Inmates in Disciplinary Segregation:* Inmates placed in Disciplinary Segregation will be reviewed by the Institution Discipline Committee at least once a week on the record. The Committee will formally review the cases of all inmates who spend ten (10) continuous days in Disciplinary Segregation, and thereafter such cases will be formally reviewed at least every thirty (30) days. The inmate shall appear before the Institution Discipline Committee at such formal reviews unless the inmate refuses to appear without the use of force.

There will be a psychiatric or psychological interview when Disciplinary Segregation continues beyond thirty (30) days. The interview and report should address the inmate's adjustment to his surroundings and the threat the inmate poses to himself, staff and other inmates. A similar psychiatric or psychological interview and report will be made at subsequent two month intervals should segregation continue for this extended period.



An inmate shall be released from Disciplinary Segregation when he no longer poses a threat to himself, or others or to institutional security and when the Institution Discipline Committee determines that continuation in Disciplinary Segregation is no longer necessary to regulate an inmate's behavior within acceptable limits. The time an inmate spends in Disciplinary Segregation must be proportionate to the offense committed, taking into consideration the inmate's prior conduct, his specific program needs, and other relevant factors.

(3) *Conditions of Disciplinary Segreation:*

(a) Basic living levels of decency and humane treatment must be maintained, regardless of the purpose for which a man has been segregated. Privileges may be added, for the purpose of reinforcing acceptable behavior, to the living conditions of those whose status is purely involuntary, or whose confinement is long-term. These should not result in excessively time-consuming procedures, or neutralize security or shakedown procedures.

(b) When different levels of living arrangements are effected, because of the difference in purpose of segregation, the differential facilities should be separated physically in ways that materials allowed to one person are not passed to others to whom they are not allowed.

(c) A description of basic living levels follows:

1. *Segregation Conditions:* The quarters used for segregation shall be well ventilated, adequately lighted, appropriately heated and maintained in a sanitary condition at all times. All cells will be equipped with beds. The beds may be securely fastened to the floor or wall of the cell according to the desires and needs of each

individual institution. Strip cells will not be a part of the Segregation Unit. Any strip cells which will be utilized will be a part of the medical facility and under the supervision and control of the medical staff.

2. *Cell Occupancy:* Except in emergencies the number of inmates confined to each cell or room shall not exceed the number for which the space was designed. Whenever an emergency arises which indicates that excess occupancy may be temporarily needed, an immediate report shall be made to the head of the institution and his approval obtained.

3. *Clothing and Bedding:* All inmates shall be admitted to segregation dressed in normal institution clothing after a thorough search for contraband but without belt and shall be furnished a mattress and bedding. Cloth or paper slippers may be substituted for shoes at the discretion of the Warden. An inmate shall not be segregated without clothing, mattress, blankets and pillow, except when prescribed by Medical Officer for medical or psychiatric reasons. If an inmate is so seriously disturbed that he is likely to destroy his clothing or bedding or create a disturbance which would be seriously detrimental to others, the Medical Department shall be notified immediately and a regimen of treatment and control instituted with the concurrence of the Medical Officer.

4. *Food:* As prescribed in existing regulations, segregated inmates shall be fed the normal institution meals on the standard ration and menu of the day for the institution. Disposable utensils may be used when necessary.

5. *Personal Hygiene:* Segregated inmates shall have the opportunity to maintain an acceptable level of personal hygiene, e.g. toilet tissue, wash basin, tooth brushing, eye glasses,



etc. When necessary, for reasons of safety or security, a retrievable kit of toilet articles may be issued. Each segregated inmate should shave and shower at least two (2) times a week, unless these procedures would present an undue security hazard.

6. *Exercise:* Each segregated inmate shall be permitted no less than two (2) hours exercise each week. Exercise should be provided in two (2), one (1) hour periods, but if circumstances require, one-half hour periods are acceptable if the two (2) hour minimum is maintained. This provision must be carried out unless compelling security or safety reasons dictate otherwise and these shall be documented.

7. *Personal Property:* Personal property will ordinarily be impounded.

8. *Reading Material:* Ordinarily, it may be provided on a circulating basis.

9. *Supervision.* In addition to the direct supervision afforded by the unit officer each segregated inmate shall be seen daily by a member of the Medical Department, and one or more other responsible officer(s) designated in the local policy issuance.

10. *Correspondence and Visits:* Social correspondence privileges shall be continued in segregation unless there exist compelling reasons to the contrary. Every effort will be made to notify approved social visitors of any necessary restriction on ordinary visiting procedures so that they may be spared disappointment and unnecessary inconvenience. If ample time for correspondence exists, the burden of this notification may be placed on the inmate. In respect to legal, religious, and PMB matters, the relevant policy statements should be followed.

11. *Records:*

a. A permanent log will be maintained in the segregation unit. All admissions will be recorded indicating date, reason for admission, and the authorizing official. All releases from the unit will be similarly recorded. Officials required to visit the unit will sign this log, giving time and date of visit. Unusual activity or behavior of indivdual inmates will be recorded in the log with a follow-up memorandum through the head of the institution for the inmate's file. This will include any misbehavior which should be recorded and reported to the Institution Discipline Committee.

b. A Special Housing Unit Record Sheet (BP-IS-111) will also be maintained in accordance with the following instructions, and sent to the institution's central file.

1. The Key at the bottom of the form is self-explanatory.

2. The basic information at the top of the form, with the exception of the date and time of release, will be completed by the Officer in Charge/Unit Officer at time of admittance.

3. The form provides space for a period of up to ten (10) days. The date column will be recorded daily, the shift line will be completed commencing so as to coincide with the date and time the inmate is admitted as reflected at the top of the form.

4. The Officer in Charge/Unit Officer will sign the form in the space provided on line with the shift as indicated. Initials of the officer are not acceptable.

5. The Physician's Assistant will indicate by his signature in the proper space when an inmate received medication, is examined by a Medical Officer or Physician's Assistant, or request [sic] to see a member of the



medical staff. If no medication is received or request made during a shift, the officer may so indicate by recording "NO (N)" in the column.

6. The form is designed for a ten (10) day period, if confinement to segregation continues beyond a ten (10) day period, a new form will be prepared and the completed form forwarded to central file. Date and time of release will be recorded on the final form.

7. Additional comments may be noted on the reverse of the form and in each case, must be dated and include the signature and title of the person making the comment.

12. *Forms:*

a. Notice of Institute Discipline Committee Hearing (BP-IS-114), Locally Reproduced,

b. Inmate Rights at Institution Discipline Committee Hearing (BP-IS-113), Locally Reproduced,

c. Special Housing Record Sheet (BP-IS-111), Locally Reproduced. See Policy Statement 20,001.1B, Note: Title change must be entered manually on existing stock of forms. New forms will include these changes,

d. Incident Report (BP-IS-83A), Secured through regular FPI procurement sources, Note: See Policy Statement 7400.5C, Page 6 for change to Item 254, and addition of Item 257 which must be entered manually on existing stocks of forms. New forms will include these changes, and

e. Institution Discipline Committee Report (BP-IS-115), Locally Reproduced.

/s/ _____

NORMAN A. CARLSON
*Director, Bureau of Prisons*

U.S. DEPARTMENT OF JUSTICE
BUREAU OF PRISONS

INCIDENT REPORT

1. NAME OF INSTITUTION
USP—Terre Haute, Indiana

PART I—INCIDENT REPORT

2. NAME OF INMATE
SAXNER, David

3. REGISTER NUMBER
28759-138

4. DATE OF INCIDENT
02-14-75

5. TIME
11:00 A.M.

6. PLACE OF INCIDENT
D-Unit

7. ASSIGNMENT
Unit Janitor

8. QUARTERS
D-Unit

9. INCIDENT
ENCOURAGING OTHERS TO REFUSE TO WORK.

10. CODE
255

11. DESCRIPTION OF INCIDENT
For the last few days this inmate has been encouraging a work stoppage by having others go out into the industries area to encourage this stoppage. This individual has also been observed moving about the entire institution and from information received, has been encouraging a work stoppage.

12. SIGNATURE OF REPORTING EMPLOYEE
/s/ G.D. Wilson

13. NAME AND TITLE (PRINTED)
G.D. WILSON, ADMINISTRATIVE SUPERVISOR

14. INCIDENT REPORT DELIVERED TO ABOVE INMATE BY
/s/ (Illegible)

15. DATE INCIDENT REPORT DELIVERED
2-15-75

16. TIME INCIDENT REPORT DELIVERED
10:00 a.m.



PART II—COMMITTEE ACTION

17. COMMENTS OF INMATE TO COMMITTEE REGARDING ABOVE INCIDENT

18. IT IS THE FINDING OF THE COMMITTEE THAT: ("X" APPLICABLE BOX)
☐ YOU COMMITTED THE PROHIBITED ACT AS CHARGED.
☐ YOU COMMITTED THE FOLLOWING PROHIBITED ACT:
_____
☐ YOU DID NOT COMMIT A PROHIBITED ACT

19. COMMITTEE FINDINGS ARE BASED ON THE FOLLOWING INFORMATION

20. COMMITTEE ACTION
Refer to Inmate Discipline Committee.
/s/ D. P. Orr, CS.

21. DATE OF ACTION

PART III—INVESTIGATION

22. DATE
2/15/75

23. INMATE STATEMENT AND ATTITUDE
Inmate stated that this charge was totally absurd and that he was categorically innocent. He stated that he was charged with this because he refused to go to the Farm Camp. He said he had nothing else to say. His attitude was fair during the interview.

24. OTHER FACTS ABOUT THE INCIDENT
Considering the various items picked up from this man's cell, I would say there is little doubt about his activities.

25. INVESTIGATOR'S COMMENTS AND CONCLUSIONS
Guilty as charged. A definite ringleader in the activity charged.

26. ACTION TAKEN
Refer to Seniro [sic] Administrative Lieutenant D. P. Orr.
/s/ (illegible)
Correctional Supervisor

U.S. DEPARTMENT OF JUSTICE
BUREAU OF PRISONS

INCIDENT REPORT

1. NAME OF INSTITUTION
USP—Terre Haute, Indiana

PART I—INCIDENT REPORT

2. NAME OF INMATE
CAIN, Alfred Michael

3. REGISTER NUMBER
illegible

4. DATE OF INCIDENT
2-14-75

5. TIME
11:00 A.M.

6. PLACE OF INCIDENT
E-Unit

7. ASSIGNMENT
Paint Shop

8. QUARTERS
E-Unit

9. INCIDENT
ENCOURAGING OTHERS TO REFUSE TO WORK.

10. CODE
255

11. DESCRIPTION OF INCIDENT
For the last few days this inmate has been encouraging a work stoppage by having others go out into the industries area to encourage this stoppage. This individual has also been observed moving about the entire institution and from information received, has been encouraging a work stoppage.

12. SIGNATURE OF REPORTING EMPL0YEE
/s/ G.D. Wilson

13. NAME AND TITLE (PRINTED)
G.D. WILSON, ADMINISTRATIVE SUPERVISOR

14. INCIDENT REPORT DELIVERED TO ABOVE INMATE BY

15. DATE INCIDENT REPORT DELIVERED
2-15-75

16. TIME INCIDENT REPORTED
10:00 a.m.



PART II—COMMITTEE ACTION

17. COMMENTS OF INMATE TO COMMITTEE REGARDING ABOVE INCIDENT

18. IT IS THE FINDING OF THE COMMITTEE THAT: ("X" APPLICABLE BOX)

☐ YOU COMMITTED THE PROHIBITED ACT AS CHARGED

☐ YOU COMMITTED THE FOLLOWING PROHIBITED ACT:

_____

☐ YOU DID NOT COMMIT A PROHIBITED ACT

19. COMMITTEE FINDINGS ARE BASED ON THE FOLLOWING INFORMATION

20. COMMITTEE ACTION
Refer to Inmate Discipline Committee.

/s/ D. P. Orr, CS.

21. DATE OF ACTION

UNITED STATES PENITENTIARY
TERRE HAUTE, INDIANA
Form B, 7400.5C-TH, 10-04-74

**INMATE RIGHTS AT INSTITUTION DISCIPLINE COMMITTEE HEARING**

As an inmate charged with a violation of institution rules or regulations referred to the Institution Discipline Committee for disposition, you have the following rights:

1. The right to have a written copy of the charge(s) against you at least 24 hours prior to appearing before the Institution Discipline Committee;

2. The right to have a full-time member of the staff who is resonably available to represent you before the Institution Discipline Committee;

3. The right to call witnesses and present documentary evidence in your behalf, provided institutional safety would not be jeopardized;

4. The right to be present throughout the Institution Discipline Committee hearing except during Committee deliberations and except where institutional safety would be jeopardized;

5. The right to be advised of the Institution Discipline Committee's decision, the facts supporting the Committee's decision, except where institutional safety would be jeopardized, and the Committee's disposition in writing; and,

6. The right to appeal the decision of the Institution Discipline Committee by means of the Administrative Remedy Procedure to the Chief Executive Officer (Warden) within 30 days of notice of the Committee's decision and disposition.

I hereby acknowledge that I have been advised of the above rights afforded me at an Institution Discipline Committee hearing.

/s/ _____
DAVID SAXNER
28759-117
February 15, 1975



(Where an inmate has been advised of his rights afforded at an institution Discipline Committee hearing, but refuses to sign the acknowledgement, the following should be completed.)

I have personally advised _____
(inmate's name and register no.)
of the above rights afforded him at an Institution Discipline Committee hearing; however, he has refused to sign the acknowledgement.

Signed: _____
(Employee's Typed name)

_____
(Date)

UNITED STATES PENITENTIARY
TERRE HAUTE, INDIANA

INSTITUTION DISCIPLINE COMMITTEE REPORT

FORM D, 7400.5C-TH, 10-04-74
DATE: February 21, 1975
TIME: 9:35 am to 10:40 am

NAME OF INMATE: David SAXNER
REG. NO.: 28759 c 117

The inmate has been advised of his rights before this committee. [X] A copy of the advisement of rights form is attached.

This hearing is held to consider the Incident Report(s) dated:
2-14-75

The following persons appeared before the Committee:
Mr. Fred Smith

Summary of statements made and information presented to the Committee:
Inmate admits the charge(s): [ ] Yes [X] No.

The Incident Report was read to Saxner and he was again advised of his Rights, which he states he understands. Saxner requested Mr. Class as a Staff representative at first but later requested to have Mr. Fred Smith as a Staff representative. Saxner also requested inmate witnesses in his behalf.

Mr. Cleavinger asked Saxner what he can tell the committee about the incident. Saxner stated that first, he is Not Guilty, and was categorically innocent; and besides the depositions submitted and evidence, Saxner stated he is willing to take a lie detector test, at his own cost, to prove the charges brought against him are totally untrue. Mr. Cleavinger informed Saxner there will be no lie detector test.

The Committ [sic] finds that
[ ] The act was committed as charged
[ ] The following act was committed:
255 701 208
[ ] No prohibited act was committed.



(If this is the finding, this report and all related reports will be destroyed.)

Action Taken:
Administrative Detention. Discontinue Meritorious Pay and Good Time. Recommend Transfer to another Institution. The I.D.C. has Forfeited 84 Days of Saxner's Good Time
Review for Record February 25, 1975
Formal Review March 3, 1975

Reason for Action Taken:
Saxner was found Guilty of Encouraging Others to Refuse to work from the information received from Staff and the written and investigative reports. He was also found Guilty of Unauthorized Use of Mail (701) (sending manuscripts out) and Possession of Contraband (208) (article from Prisoners Union, Leavenworth Penitentiary). It is felt the Education Supervisor, or his representative should talk with Saxner regardng manuscripts and the regulations.

[ ] The inmate has been advised of the findings and orders of this committee.
[ ] The inmate has been advised of his right to appeal this action within 30 days, to the Chief Executive Officer.
[ ] A copy of this report has been given to the inmate.

T. Cleavinger, Chairman
/s/ M. Marcadis Member
/s/ T.P. Lockett Member

Saxner stated that he would like for the record to state, at least, that he requested it to prove he is Not Guilty. He also wanted to state that in April of this year he will go before the U.S. Board of Parole for parole consideration and feels he is an excellent candidate for parole. Saxner states he has received two minor Incident Reports and one of them usually isn't given to inmates while in the Prison System. Saxnar states he has Minimum Custody and MGT and had MSA until he went out on writ. Saxner stated he also has a cross section of letters going to the Parole Board offering him jobs, letters from university professors, etc., to show his chances of parole are extremely good. Saxner stated he thinks if he had all those things going, plus being a first offender, it would be sort of insane for him to jeopardize all of his chances before he goes to the Board. Mr. Lockett informed Saxner that many people who are to go soon do things to delay their leaving. Saxner stated he would like to have the record reflect he has all these things and would like them for evidence. Saxner stated he also understands he is not allowed to have repetitive witnesses; but the way the charges are written up the only way he can prove he is Not Guilty is to have any member of the panel ask people if he encouraged people not to work, etc.—and that would be another way to establish his innocence.

Mr. Lockett informed Saxner it would be very foolish to ask inmates if he encouraged a work stoppage, and he (Saxner) understands that—they wouldn't say "Yes" and Saxner knows that. Saxner stated that no prisoner would be jeopardized and it would also clear him. Saxner stated he would like to have the record reflect he asked to have this happen. Mr. Lockett informed Saxner again it would be impossible to put a person in that position.

Saxner stated he has four Depositions to submit from inmates he has some kind of a relationship with in population (attached) and they are from:

James McShane  Earl Williams
Paul Bryant  John Campbell

Saxner stated that these Depositions prove various things that during the week when he was allegedly sending respresentatives around the institution to encourage others



to not work and he was charged with trying to organize the stoppage—these witnesses admit he has never attempted to organize anything and can say what his involvement was.

Mr. Lockett asked Saxner if he says he never attempted to try to organize any type of Union or work stoppage, or anything like that, and he said "That is right."

Mr. Marcadis informed Saxner that all the Depositions do is give the committee one person's opinion but cannot make a blanket statement—but only from what they know. The four Depositions in question were read to the Committee.

Saxner stated that his feelings are that he has established, through the Depositions, that during the week when he allegedly sent representatives throughout the institution to encourage other people not to work—they didn't hear about the strike or see him encouraging or attempting to organize a strike. Saxner feels he also proved he is a serious-minded artist and his activities throughout the institution are related to studies, etc.; and persons close to him knew nothing of the work strike and didn't hear of the alleged work strike. Saxner stated that from the evidence he knows the committee has from this particular incident, that the evidence confiscated from his property is unrelated to the charge but within his constitutional rights and Bureau of Prisons and Terre Haute statement guidelines. He feels they are his rights of freedom of expression to submit sealed letters through the P.M.B. mail box and he claims a letter of his was confiscated to a news representative, that can be mailed, regarding mistreatment within the prison hospital.

Mr. Lockett asked Saxner if he works in the hospital. Saxner stated he does not. Saxner claims both of the things are P.M.B. literature that should go out of the institution unread, and is privileged reading material. Saxner stated he also believed there is a letter to an attorney being used as evidence that does not relate to the matter. Saxner claims Supreme Court rulings state that under no circumstances will the Administration read attorney-client mail in or out of the institution; and from his knowledge the evidence has nothing to do relating to the charges but he feels he is being persecuted and will be persecuted for something entirely unrelated to the charges.

Mr. Lockett asked Saxner if he is saying that at no time did he support, or attempt to organize a Union, or pass out pamphlets to other inmates advocating this. Saxner stated the only paper he passed to other prisoners in this institution was he gave to John Mayberry a copy of an article and he is a friend of his in the institution.Mr. Lockett informed Saxner he told the committee it is privileged mail but he passed it to other people and Saxner said he did if he wanted to show a friend an article. Mr. Lockett asked Saxner if he feels there are exceptions to this for him and Saxner stated "Privileged mails is in reference to prison officials and myself." Mr. Lockett informed Saxner that not only did Mayberry have a copy of the item but Cain stated he had a copy of something of Saxner's. Saxner claimed it was a copy of a letter to an attorney.

Mr. Marcadis showed Saxner an article and asked him if he wrote it. Saxner stated it seems to be a rough draft of something he did write. When Marcadis asked him about another item, Saxner said "That is my writing." Mr. Marcadis said "How about this, which is a cleaned up version of the first thing?" Saxner stated it is a shorter version of something else, which is also his. Mr. Marcadis showed Saxner another item and Saxner said it isn't his and it isn't his handwriting. Mr. Marcadis informed Saxner all the articles were found in his personal property. Saxner said one item is a carbon copy of something that went to various newspapers for publication, through the P.M.B. When Mr. Marcadis asked Saxner if he had authorization for it, as the statements says, Saxner admitted he didn't. Mr. Marcadis asked Saxner about still another item and Saxner stated it was a rough draft of a smaller item, and is his. When asked about another one, Saxner stated they are notes for an article. Mr. Marcadis informed Saxner that he mentions Staff members and inmates in the manuscripts going out and Saxner asked if he meant inside the articles. Mr. Marcadis said "Yes—did you have the inmate's permission to mention his name?" Saxner said "No." Mr. Marcadis asked Saxner if he had any of the Staff member's permission to mention their name and Saxner said "No."



Mr. Marcadis informed Saxner he had no specific permit and each manuscript has to be individually cleared and informed Saxner he has no right, under P.M.B., to have published manuscripts to go out unless specifically cleared. Saxner was told he didn't get authorization and did mention Staff members and didn't get their authorization, or inmates' families—living or dead—to mention their names. When asked where he works, Saxner said as a unit janitor. Mr. Marcadis asked Saxner if he ever wanders around the shops or Industries areas, and he said the only time he has been in Industries was when he was arranging for a band to come in.

Mr. Smith stated that one thing he didn't mention before was Saxner said to him the reason he wanted Johnny Campbell to make a statement is that Campbell is known as a kind of shady person and if anything was going on, Campbell would be involved in it. Mr. Smith said Saxner also stated that everything he has done was for outside the institution and not for within the institution—in other words, he wasn't doing this and mass producing and handing it to inmates. Saxner stated that if the committee would note, the way the articles are set up, obviously they were not intended for prisoners and wants to have the record to reflect that the articles are something that is set up for people on the streets and not to be passed around the institution to incite others to create disturbances.

Mr. Marcadis asked Saxner if he permitted other inmates to read the articles and he said he gave Mayberry one, but he never read it; and the carbons were to be mailed out but he never mailed them. When asked where it was published, Saxner said in a few places in New York.

Mr. Lockett asked if the letters were type [sic] and where he uses the typewriter. Saxner said on that particular one, he had a typewriter in his cell. Mr. Lockett asked Saxner who gave him permission. He said it was for a manuscript, from Mr. Veltri—the legal library man. Mr. Marcadis noted the comments about inmate Lowe and asked Saxner where he got the information at 5:30 in the morning. Saxner said he wasn't out of his cell but doesn't think he is at liberty to shed light on his source of information. Mr. Marcadis said Saxner made statements about his medical evaluation, or lack of it,

and asked Saxner if that was done through his medical wisdom. Saxner said information flowed about the population that was checked out with sources on the streets.

Mr. Lockett asked Saxner if he goes from various inmates to others and makes a survey. Saxner stated when something happens inside an institution setting there will always be rumors and feed back, and the information he picks up from word of mouth he checks with people on the streets. Mr. Lockett told Saxner he approaches people and attempted to get information and asked Saxner why they approach. He stated they approach him many times as people think he is the jailhouse lawyer type. He states the image has always stuck with him and when people have complaints they sometimes come to him.

Mr. Lockett asked were the grievances for medical problems, etc., presented. Saxner said they weren't but he plans to write a book one day. Mr. Marcadis asked if he planned to take them before the administration sooner or later and Saxner said "No."

Mr. Marcadis said "You mentioned, Fred, about him wanting a Deposition from Campbell because if anything was going to happen, he would be in on it." Mr. Smith replied that he is the type of person that if anything was going to happen, he would know about it and the only reason Campbell was picked was he associates with him and he is known in the institution to have been involved in a lot of things; and if anything is going to happen, he is usually involved in it.

Mr. Marcadis asked Saxner about the literature he glanced at and agreed it was his handwriting, that if he thinks that if it was found in the hands of inmates less stable than Saxner, it could be considered inflammatory. Saxner stated "No," and that usually something really has to happen to motivate them to make any type of move. He stated that he has seen incidents within the penitentiary that nothing moved the inmates here to do anything; and the average prisoner here is not going to pick something up and be moved by it. Saxner claimed when he gave Mayberry a copy of the article, he stated he never read it—and that is generally what happens. Mr. Marcadis said "Not read it, but look at it and take things out of context." Saxner felt he did not



consider it inflammatory as prisoners aren't moved by typewritten things—written things don't move people but something like a death and the fact that 800 or 900 people didn't work—that could move people.

Mr. Lockett informed Saxner that he doesn't believe he (Saxner) or himself have the capabilities to say whether a letter will have an inflammatory effect—the letter has been written and has this type of connotation and will have to be taken that it can have an inflammatory effect.

Saxner stated that if he wanted to write somthing that would be considered inflammatory, he would put something basic to the prisoners to incite them to make a move and be as brief and concise as he can be. He stated that something that is 3 or 4 lines they will read, but if it is several pages long they won't look at it. Saxner stated that he would like to mention that, as charged, the evidence he has seen, in his eyes, does not support the allegations from Mr. Wilson's shot.

Saxner used the P.M.B., not for what it was intended, and violated policy statements on the use of typewriters and manuscripts. Saxner verified the confiscated materials were his.

UNITED STATES PENITENTIARY
TERRE HAUTE, INDIANA

INSTITUTION DISCIPLINE COMMITTEE REPORT

FORM D, 7400.5C-TH, 10-04-74
DATE: February 21, 1975
TIME: 8:50 am to 9:35 am

NAME OF INMATE: Alfred M. CAIN
REG. NO.: 29847 c 138

The inmate has been advised of his rights before this committee. [ ] A copy of the advisement of rights form is attached.

This hearing is held to consider the Incident Report(s) dated:
2-14-75

The following persons appeared before the Committee:
Mr. J. R. Alvarado

Summary of statements made and information presented to the Committee:

Inmate admits the charge(s): [ ] Yes [ ] No.

The Incident Report was read to Cain and he was again advised of his Rights, which he states he understands. Cain requested to have Mr. C. Nave as a Staff representative, but he was not available. Cain then requested to have Mr. J.R. Alvarado as a Staff representative. Cain did not wish to have inmate witnesses in his behalf and he admitted refusing to sign any of the documents.

Mr. Cleavinger asked Cain what he can tell the committee about the report. He stated he told Mr. Jean, the Investigating Officer, he didn't engage in any of these activities and he didn't do any of this. Mr. Cleavinger asked Cain what he did.

The Committ [sic] finds that:
[ ] The act was committed as charged
[ ] The following act was committed:
255 208
[ ] No prohibited act was committed.



(If this is the finding, this report and all related reports will be destroyed.)

Action Taken:
Administrative Detention.
Recommend Transfer to another Institution.
The I.D.C. has Forfeited 96 Days of Cain's Good Time
Review for Record February 26, 1975
Formal Review March 3, 1975

Reason for Action Taken:

Cain was found Guilty of Encouraging Others to Refuse to Work (255) and also Charge 208, based on the fact he was observed moving about the institution and encouraging other inmates to participate in a work stoppage and also having inflammatory material, which was supporting disruptive conduct in the institution. He is being placed in Administrative Detention as it is felt he is a threat to the security of the institution and his presence on the compound would be a continued threat to the population.

[ ] The inmate has been advised of the findings and orders of this committee.
[ ] The inmate has been advised of his right to appeal this action within 30 days, to the Chief Executive Officer.
[ ] A copy of this report has been given to the inmate.

T. Cleavinger, Chairman
/s/ M. Marcadis, Member
/s/ T.R. Lockett, Member

Cain claims he is supposed to be going for Parole in June and expects to make it and hasn't received an Incident Report for more than a year. He claims he didn't engage in any of this activity mentioned and wants to take a lie detector test, which he will pay, to show he didn't commit any of the activities. Cain stated he would like to know who said he was encouraging them not work, etc., and hopes this will be one of the ways this issue could be resolved as none of it is true. Cain stated it would have been foolish for him to encourage a work stoppage as he is getting ready for Parole. Cain was advised the committee is not going to give him a lie detector test.

Mr. Lockett asked Cain if he was trying to talk up anything or form a Union or organization. Cain said "No." Mr. Lockett asked Cain if he is not in favor of a Union and Cain said he wasn't trying to form one but feels prisoners would be in a better position if there was one in here. Mr. Lockett asked if he meant they would run the place then. Cain stated he didn't say that—he didn't try to organize a Union or organization for a work stoppage, and never encouraged anybody to not go to work; and for him to get involved in what he is alleged, would be foolish.

Mr. Marcadis asked Cain if he ever passed out any of the literature that was found in his possessions, or give to anyone else, and Cain said "No." When asked why he had it, Cain stated it was given to him by someone he had a good relationship with.

Mr. Lockett asked Cain who gave it to him and he said "a man who is not in the institution any more." He said his name is "Imami" (?).

Mr. Marcadis asked Cain why Mr. Wilson said he has been observed in other parts of the institution other than where he is assigned. Cain said that is not true and doesn't know why it was said. Mr. Marcadis asked Cain if he has never been in areas other than where he is assigned and he said "No, and never told anyone else in Industries not to go to work." Mr. Marcadis informed Cain that he said the things in his locker were dated one or two years ago, and showed him an item dated 1974. Cain asked what it said as it wasn't his and he didn't write it. Mr. Marcadis informed Cain that no one said he wrote it but it was found in his property. Cain



was asked who did write it. Cain stated his name is "David Saxner" on it. Cain was asked if he ever read it before and he said he has never seen it before.

Mr. Cleavinger informed Cain it looks like he is pretty well involved in trying to encourage a work stoppage. Cain stated again he would like to take a lie detector test as it would show he wasn't involved, and doesn't even know who said they saw him do it.

Mr. Lockett informed Cain that some of the officers have seen him out of bounds and in areas he is not supposed to be. Also, he has materials in his area indicating support and recommendation for a Union, and supporting a work stopage. Cain stated he doesn't have any material indicating he was trying to organize a Union or support a work stoppage, and he tried to discourage the last one we had.

Mr. Marcadis asked Cain if he said he had nothing in his possession that was encouraging dissension or unrest, or an attitude to encourage people to get up in arms in violation of rules. Cain stated he said he didn't have anything in his possession that indicated he was trying to start a work stoppage or not go to work, or form a Union. Mr. Marcadis again informed Cain he didn't say he wrote the item but had it in his property.

Mr. Alvarado stated Cain told him he is Not Guilty of these charges and is willing to take a lie detector test and pay out of his commissary funds. Mr. Alvarado states he doesn't know Cain too well but never had any trouble with him, but does know him. Mr. Alvarado states Cain told him he wasn't Guilty and wants this in his record that he did request a lie detector. Cain stated he has been trying to do whatever he has to do to get out of this institution, and expected to make Parole. He claims he is going to Vincennes University yet. Cain stated if the committee is trying to find out the truth, he doesn't know why he can't take a lie detector test, and would be willing to sign any waivers and pay for it. Also, he would like to have the opportunity to ask whoever said he did this, and would like to establish what he is saying is true.

Cain identified David Saxner, 28759-117, as the writer of the letter of January 9, 1974, to Arpiar Saunders, Attorney, National Prison Project, Washington, D.C.

FEDERAL BUREAU OF PRISONS
REQUEST FOR ADMINISTRATIVE REMEDY

To x Warden of Institution
Director, Bureau of Prisons
From: Saxner, David L. 28759-117 USP TERRE HAUTE

**Part A—INMATE REQUEST**

On February 14, 1975, I was placed in Administrative Detention and charged with "encouraging others to refuse to work." One week later, on the 21st of February, I was convicted of the said charge and also charged and convicted with two more offenses; possession of contraband (grievances from Leavenworth) and misuse of the mail (sending out manuscripts).

When I appeared before the IDC I told them I was innocent of the charge that I was before them for. I offered to take a lie detector test, at my own cost, to prove that I was in fact innocent. This request was denied and both the request and the denial are recorded in the IDC transcript.

I tried to explain to the IDC that I was going up for parole in April and that I wouldn't do anything to hinder my chances for making parole. I felt I was in excellent position to make parole. I brought a number of letters from prospective employers and others who could offer assistance if I were released.

I explained to the IDC I had minimum custody, was receiving Meritorious Good Time, had only two minor incident reports in the four years I've been in prison, that I have been in prison for four years on a marijuana-related "crime," and that I had scored nine out of a possible eleven points on the Board's Salient Factor Sheet (which means under my "high" category I'm expected to serve 16-20 months in prison, and at this time I have three times that much served!). I asked the IDC to consider all this.

However, the IDC wasn't at all concerned with any of this. They were convinced that I was guilty as charged. The charge states: "For the last few days this inmate has been encouraging a work stoppage by having others go out into the industries area to encourage this work stoppage. This individual has also been observed moving about the entire institution and from information received, has been encouraging a work stoppage."



Yet, the IDC failed to present *any* evidence to support their allegations. The only "evidence" against me was an article I had written about the hospital conditions entitled "Prisoners At Terre Haute Seek An Investigation"; a four page letter to a media representative dealing with medical "treatment"; some notes I had hoped to use for a future book dealing with the prison industries; a list of grievances written and signed by the Federal Prisoners' Coalition at Leavenworth; and carbon copies and rough drafts of the previously mentioned article. I admitted that all of the foregoing were indeed mine, save the article from Leavenworth. But the fact of the matter remains that none of this is evidence to support the charges I'm currently in segregation for.

I submitted four depositions to the IDC. They're a part of the record so I will not bother detailing them. You should read them yourself. They are written by four prisoners whom I was in constant touch with during the week when I was allegedly organizing this fantasy strike. Each deposition is quite explicit, and together they show that during the week in question, i.e., from February 10-14, that I was concentrating my efforts on setting up a February 14th Creative Arts Workshop show; that people who were close to me did not ever hear me mention anything about organizing a work stoppage; that if I had been organizing a work stoppage they would have been aware of it; and that it would have been highly improbable for me to have been organizing a work stoppage without their knowledge.

But the IDC seemed to disregard all of this. Mr. Smith, my representative, was amazed to see me convicted from the evidence presented by the IDC. Ask him if he thinks I was guilty. He knows that I wasn't guilty as charged. He knows that I was only found guilty because I had written an article exposing the hospital conditions. In other words, this is some retribution for something I did that was within the Bureau of Prisons' guidelines, within Terre Haute policy statement guidelines and surely within the guidelines of the First Amendment of the United States Constitution. I could cite

numerous court decisions to support my claims, but I understand that this remedy doesn't deal with legalities.

When the IDC was deliberating Mr. Smith mentioned to the members that he felt they should either reword the charge, give me new charges or do something to make the charges coincide with the evidence. The IDC then gave me two new charges; the misuse of the mail and possession of contraband charges mentioned on page one.

The charges are wholly nonsensical and are also inconsistent with the Bureau policy statement on Inmate Discipline dated October 4, 1974 and coded 7400.5C. The fact that the charges were lodged against me while the IDC was deliberating is in violation to the aforementioned policy statement. May I direct your attention to page 9, section 8(a) of that statement which quite clearly states "Each inmate charged with violating an institution rule or regulation shall be given a written copy of the charge or charges against him within 24 hours of the infraction." The section just cited was in reference to minor violations, which I assume the charges were since they weren't presented to me until *after* the IDC commenced its deliberations. If this is considered a major offense then let me refer you to page 10, section 9(c)(1) concerning *Procedural Requirements:* To wit, "an inmate will be given advance written notice of the charge(s) against him no less than 24 hours before the Institution Discipline Committee. An inmate may waive in writing this 24 hour notice requirement." I did not waive this notice.

Also, you'll note that Attachment B in the aforementioned policy statement touches on the matter of advanced written notice of charges. The FIRST RIGHT on that page reads "The *right* to have a written copy of the charge(s) against you *at least 24 hours prior* to appearing before the Institution Discipline Committee." (Emphasis added.)

In reference to the misuse of mail charge, i.e. sending out manuscripts, let me say this. I wrote the National Prison Project to procure the copies of the latest policy statements that I needed to prepare this appeal; I know that it's impossible to get these policy statements inside the general population, yet [sic] alone in segregation (this too is a violation of



Bureau policy statements that say prisoners both in segregation and in the general population should have access to full copies of policy statements). Anyway, I've thoroughly covered policy statement 1229.1 dated February 11, 1972, entitled "Inmate Correspondence With Representatives Of The Press And News Media." The purpose of this statement, and I quote in pertinent part, is "... to protect First Amendment rights of inmates, within the constraints of sound institutional management." There is nothing in this policy statement that says I have to get an outgoing manuscript approved before I send it out. To the contrary, the intent of this policy statement and the Prisoners' Mail Box is to afford the prisoner a chance to speak up against his conditions, keepers or treatment without having to foreclose his/her name or without putting him/herself in jeopardy. So the charge against me for misuse of the mail is totally without merit.

There is more. At the IDC I raised the issue of "privileged correspondence." I feel that anything that is for the Prisoners' Mail Box is privileged since the sole expressed intent of the PMB is to protect the writer's future within the federal prison system. One of the pieces of evidence against me was a carbon of a letter I had mailed to John Antonides, editor of the local Bloomington paper. This is correspondence with a bonafide news representative, and such letters are consistent to the policy statement mentioned previously on this subject. I am now being persecuted, in part, for writing this man.

There is more. Alfred Cain Jr. was locked up partially because he had in his cell a copy of a letter that I had written to an attorney. Surely I need not tell you that attorney-client mail is privileged. I know you know there are many court decisions, including from the Supreme Court, that prohibit prison officials from reading attorney-client mail. At this point both Cain and I are being persecuted for this letter's content. I raised the claim of attorney-client confidentiality before the IDC. They ignored me, just as they ignored me when I mentioned the privilege mail between prisoners and newspapers. Are these policy statements written to deceive the public about the lawlessness

that pervades these prisons, or are they written to be enforced?

There is more. John Mayberry got locked up because there was a copy of an article that I wrote in his cell. After getting locked up he was convicted of the same charges as myself, forfeited his good days and was then sent off to Leavenworth. All this because he had an article I wrote, an article I told the IDC I wrote.

There is more. As a result of my IDC hearing on February 21, 1975, I lost 84 good days, was recommended for transfer, lost my MGT and was sent to "Administrative Detention." The regular Administrative Detention unit, as you know, is L Unit. I was told there were no cells in L Unit, that Cain had gotten the last one and that I was going to G Block. But I was assured that I was going to be on Administrative Detention status in G Block, that I wouldn't be left in the normal squalor of this infamous housing unit. However, when I got there I found out different. I was given some of my personal belongings. But, I was placed in a cell with no light. The light on the tier was out and it took me four and a half days of complaining to get it fixed. I was in total darkness for four and a half days; ask Father Bill if you don't believe me. Moreover, three lieutenants refused to move me into a cell where there was light—that was when there were only three prisoners in the entire cell block and plenty of open cells! Besides the lighting situation (or lack of it I should say), there was no ventilation in my cell, I got no fresh air or exercise, I had no spring bed, pillow or blanket, no commissary privileges, no newspapers or books were allowed to me, no law library, toilet paper was "distributed" by the handful, no toothbrushes, no phone calls, pencils, paper and envelopes were rationed, no brooms, toilet brush or cleanser to keep our cells sanitary (they did come around once in a week), and numerous other things inconsistant with pages 16-19 of policy statement 7400.5C.

There is more. While I was in G Block I was refused dental care. I was taken to the dentist's office to have my teeth cleaned, but when I got there I was told I couldn't have my teeth cleaned unless I was in the general population. When I told the dentist that I wasn't getting back in the population,



he told me that that's "a tough break." This, too, is in violation of 7400.5C. See page 16 of that policy statement part (c) which states "... To the extent possible, inmates housed in Administrative Detention will be afforded the same general privileges given to inmates in general population as is consistent with existing resources available and the security needs of the unit."

There is more. Also while I was in G Block I was denied a visit with Rev. Robert Horton. Rev. Horton is an approved visitor to any federal prisoner, at least that's what Mr. Carlson has said. I have seen him in the past, but while I was in G Block they refused to take me to the visiting room to see him.

There is more. This, too, concerns G Block. On the night of February 22, 1975, I saw eight guards beat Russel Smith. Smith was half unconscious and laying on the floor face down when Lieutenant Hicks started to violently kick him in the face. The lieutenant was kicking him so violently that his subordinates, namely John Wright, were physically pulling him out of G Block. Smith was then stripped and placed in a strip cell in the rear of G Block. He was beat again then, this time in the nude. I saw all of this while holding a mirror out through my bars. I might add that strip cells, according to PS 7400.5C pg. 18(c)(1), are only allowed to be used in the hospital. The conditions in G Block do not fall in line with the Bureau's thinking of "Administrative Detention." It is cruel and unhuman and evidently was created by some hungry sadist. I mention all these different things about G Block because they're all relevant. I had to live in there and see that kind of misery. And all this because I exercised my First Amendment "right"!

Now I have received a progress report from my caseworker, Mr. Rollins, and he has recommended to the parole board that I be continued to the expiration of my sentence. I cannot make parole unless these good days are reinstated first. And unless you reinstate them before my parole hearing in April, I will have to spend 15 months more in these overbearing, oppressive conditions.

For all of the reasons above, for the lack of evidence presented against me before the IDC, for the violations of my

prison and constitutional rights and for the treatment I've been subjected to, I beseach you to overturn the IDC's decision, reinstate my good days, discontinue my recommendation for transfer, place me back in the prison population, restore my MGT and expunge from my record, and from the records of the Parole Board, Bureau of Prisons, and any other government agency working in concert with them, any report, memo or written statement relating to this incident report.

/S/ David Saxner 28759-117
Signature of Requestor

MARCH, 17, 1975

**Part B—RESPONSE**

As discussed with you recently by the Institutional Disciplinary Committee, your record will not be expunged since the committee found you guilty of the charges. However, as you recall, the committee on the recommendation of this office and for reasons explained to you, have restored or in the process of restoring your good time, and have also returned you to the population with the notation that the incident not reflect unfavorably upon your consideration for parole.

/S/ T.P. Lockett
Department Head or Representative

/S/ [illegible]
Warden, Director or Associate

3-21-75



FEDERAL BUREAU OF PRISONS
REQUEST FOR ADMINISTRATIVE REMEDY

To: __x__ Warden of Institution
_____ Regional Director, Bureau of Prisons

From: Cain, Alfred Jr., 29347-138

**Part A—INMATE REQUEST**

On February 14, 1975, I was placed in Administrative Detention and charged with "encouraging others to refuse to work." One week later, on the 21st of February, I was convicted of the said charge and also charged and convicted of a second offense, possession of contraband.

When I appeared before the IDC I told them I was innocent of the charge against me. I offered to take a lie detector test, at my own expense, to prove that I was in fact innocent. This request was denied, and the request and the denial are recorded in the IDC transcript.

I tried to explain to the IDC that I was going up for parole in June of this year and would not do anything to hinder my chances. I felt that I was in a good position for gaining my release. My last incident report was more than a year ago, and I have been working regularly and going to college. Moreover, I have served three years on a five year sentence.

The IDC was not too concerned with my institution record. They were convinced that I was guilty of the charge. The charge states: "For the last few days this inmate has been encouraging a work stoppage by having others go out into the industries area to encourage this work stoppage. This individual has also been observed moving about the entire institution and from information received, has been encouraging a work stoppage."

Yet, the IDC failed to present any evidence to support their allegations. The only "evidence" against me was a union outline dated May 1973 and a letter written to an attorney by David Saxner. The latter was found in my cell, but as you can easily see by looking at the letter it does not belong to me. David Saxner has told the IDC that the letter did in fact belong to him. The letter deals with the conditions in the hospital, and I was afforded the opportunity to read it at my IDC hearing. That is the extent of the "evidence" which convicted me on the description of the incident mentioned above.

In addition, while I was at the IDC they charged me and convicted me of possession of contraband. The fact that this charge was lodged against me a week after I was locked up and while I was before the IDC, is in violation with the Bureau of Prisons' Policy Statement 7400.5c on Inmate Discipline dated October 4, 1974. Page 9, Section 8(a) states very explicitly that "Each inmate charged with violating an institution rule or regulation shall be given a written copy of the charge or charges against him within 24 hours of the infraction." The section just cited is in reference to minor violations, which I assume the charge was since it wasn't presented to me until *after* the IDC commenced its deliberations. If it was/is considered a major violation, then let me refer you to page 10, Section 9(c)(1) concerning *Procedural Requirements:* To wit, "an inmate will be given advance written notice of the charge(s) against him no less than 24 hours before his appearance before the Institution Discipline Committee. An inmate may waive in writing this 24 hour notice requirement." I did not waive this notice.

Also, you'll note that Attachment B in the aforementioned policy statement touches on the matter of advanced written notice of charges. The *FIRST RIGHT* on that page reads "The *right* to have a written notice of the charge(s) against you *at least 24 hours prior* to appearing before the Institution Discipline Committee." (Emphasis added)

As a result of the IDC hearing of February 21, 1975, I had 96 good days taken from me; I was recommended for transfer; and I was placed back in Administrative Detention. The parole board prohibits a prisoner parole if that person has forfeited good days; it takes six months good behavior to get those days reinstated. Therefore, as a result of this incident I will undoubtedly be denied parole.

For the two basic reasons outlined above, i.e., (1) the fact that no evidence was presented to substantiate the IDC's claims that I was trying to encourage a work stoppage, and (2) the fact that I was not given written notices in advance for the possession of contraband charge, I hereby request that you overturn the IDC's decision, reinstate my good days, place me back in the general population and forget about the recommendation for transfer. I would also request that all reference to these charges be expunged from the records of this institution, the Parole Board, the Bureau of



Prisons and all other government agencies. This, too, would be consistant with the policy statement on Inmate Discipline.

/S/ Alfred Cain, Jr.
Signature of Requestor

March 12, 1975

**Part B—RESPONSE**

As discussed with you recently by the Institutional Disciplinary Committee, your record will not be expunged since the committee found you guilty of the charges. However, as you recall, the committee on the recommendation of this office and for reasons explained to you, have restored or in the process of restoring your good time, and have also returned you to the population with the notation that the incident report not reflect unfavorably upon your parole consideration.

/S/ T. P. Lockett
Department Head or Representative

/S/ [illegible]
Warden, Associate, or Regional Director

3-21-75

FIRST COPY; For offender's central file after completion.

**Part C—RECEIPT**

Return to: Cain, Alfred Jr., 29847-138, T.H.
I acknowledge receipt this date of a complaint from the above inmate in regard to the following subject:
To overturn IDC decision.

/S/ [illegible]
Recipient's Signature (Staff Member)

3/17/75



FEDERAL BUREAU OF PRISONS
REGIONAL APPEAL
RESPONSE FOR ADMINISTRATIVE REMEDY
REQUEST

To: Regional Director, Bureau of Prisons
From: Saxner, David L., 28759-117, Terre Haute Farm Camp

***Part A—REASON FOR APPEAL:**

Herewith is a copy of my BP-DIR-9 from requesting that the IDC's charges and conviction be overturned and expunged from my reports. The reasons for this request are detailed in the aforementioned form.

RECEIVED
Apr 16, 1975
Wardens Office
United States Penitentiary
Terre Haute, Indiana
/S/ David Saxner
Signature of Requestor

March 28, 1975

*The completed Form No. BP-DIR-9 must accompany this appeal.

**Part B—RESPONSE**

Your appeal has been reviewed. The staff at the U.S. Penitentiary at Terre Haute have advised that after subsequent review of your request the disciplinary report and the action by the I.D.C. on the incident and relevant material thereto has been expunged from your record.

Therefore, the relief you requested has been granted.

J. D. HENDERSON, Regional Director
Signature of Regional Director

04-11-75

THIRD COPY: Through warden to offender's institutional file after completion.

**Part C—RECEIPT**

Return to: Saxner, David L., 28759-117, Terre Haute Farm Camp

I acknowledge receipt this date of the above inmate's appeal from the response received from the following complaint:

[illegible] /S/ [illegible]
DATE

## FEDERAL BUREAU OF PRISONS
## REGIONAL APPEAL
## RESPONSE FOR ADMINISTRATIVE REMEDY REQUEST

To: Regional Director, Bureau of Prisons
From: Saxner, David L., 28759-117, Terre Haute Farm Camp

***Part A—REASON FOR APPEAL:**

Herewith is a copy of my BP-DIR-9 from requesting that the IDC's charges and conviction be overturned and expunged from my records. The reasons for this request are detailed in the aforementioned form.

RECEIVED
Apr 16, 1975
Wardens Office
United States Penitentiary
Terre Haute, Indiana

/S/ _____
Signature of Requestor

March 28, 1975

*The completed form No. BP-DIR-9 must accompany this appeal.

**Part B—RESPONSE**

Your appeal has been reviewed. The staff at the U.S. Penitentiary at Terre Haute have advised that after subsequent review of your request the disciplinary report and the action by the I.D.C. on the incident and relevant material thereto has been expunged from your record.

Therefore, the relief you requested has been granted.

J. D. HENDERSON, Regional Director
Signature of Regional Director

04-11-75

THIRD COPY: Through warden of offender's institutional file after completion.

**Part C—RECEIPT**

Return to: Saxner, David L., 28759-117, Terre Haute Farm Camp

I acknowledge receipt this date of the above inmate's appeal from the response received from the following complaint:

[illegible] /S/ [illegible]
DATE Signature of Recipient of Regional Appeal



## PRISONERS AT TERRE HAUTE SEEK AN INVESTIGATION

The United States Penitentiary at Terre Haute, Indiana is not too different from other prisons—most prisons are located in areas of the country that enhance the probability of strangling a prisoner's intercourse with any strata of society, including his/her family and friends. Other similarities include, but are not limited to, the pervasion of racism, terror, horror and administrative corruption.

Recent events here at Terre Haute will best exemplify what is going on in prisons across the nation. The situation here is *not* unique.

On January 6, 1975, at 6:22 a.m., William Lowe, a Black prisoner from Detroit, died in the prison hospital. The following day more than 900 prisoners—out of a total population of 1076—staged a work stoppage to peacefully protest the circumstances around the death. Moreover, prisoners sought to establish a Prisoners' Council, a liaison group that could deal with prisoners' grievances; and to establish better medical facilities and procedures within the prison hospital. We *need* a doctor here seven days a week, as well as a competent medical staff at night. We *need* free and timely access to the prison hospital. And we *need* a hospital here that is equip [sic] to handle the medical needs of a community comprised of 1100 men—or, if this is a financial hardship, then the prison should establish relations with a hospital in the city of Terre Haute that could treat the men who cannot be attended to here.

As a result of the work stoppage more than 70 prisoners were locked in segregation. The vast majority of these men have been released from segregation, but the "leaders" remain locked up awaiting their transfer to more repressive federal prisons across the country.

In the meantime the administration has yet to act on the grievances brought to their attention by the strike. In fact, the administration has yet to act on its own "concession" of better medical treatment from another work stoppage in October of 1972.

In weeks subsequent to the strike prisoners have been calling for a full scale investigation into both the circum-

stances around Lowe's death and into the hospitals operation. Facts thus far uncovered are:

- As early as three days preceding his death, Lowe demanded to be admitted to the prison hospital. He was finally admitted a day and a half before he died.
- The day he was admitted to the hospital, Saturday, January 4, 1975, Lowe's case was diagnosed as viral pneumonia.
- His medication at the time consisted of cold consules, throat Lozenges, cough syrup, aspirin and Epsom salt.
- Lowe was under the care of a medical training assistant (MTA) and didn't see Dr. Silverman, then the prison doctor, until minutes before his death.
- On the morning of his death, at about 5 a.m., Lowe's condition had deteriorated and he went into a state of collapse. His vital signs were erratic.
- At approximately 5:55 a.m. on the morning of his death, Lowe was preparing to be transferred to a local hospital in the Terre Haute community. These arrangmeents were made by L.K. Snowden, the MTA working on Lowe, after getting the clearance from Ralph J. Michaud, Hospital Administrator.
- At this time Snowden contacted D.P. Orr, Senior Lieutenant, about securing a prison guard to drive Lowe to the hospital in Terre Haute.
- At about 6:05 a.m. Snowden contacted Orr and told him he had just spoken to Dr. Silverman; that Silverman was en route to the prison; and that Silverman told Snowden to keep Lowe at the prison hospital.
- At that time, approximately 6:05 a.m., Snowden administered Lowe 50 milligrams of Demerol, a powerful synthetic narcotic drug.
- Less than twenty minutes after the shot was administered, Lowe expired.
- MTA's are allowed to prescribe medication and administer it if they are registered. The MTA's working here are not registered.

The other day the Surgeon General of the United States sent a representative here to look into the circumstances around Lowe's death. This information was suppressed from the prisoner population, but there are a couple of things which have surfaced since the investigation. For example, Michaud refused to turn over a slide containing blood



samples of Lowe taken a couple days before he died. Michaud claims they "destroyed" the sample. Also, Silverman has been "released" from his job as a result of the Surgeon General's investigation.

A number of questions have come to the fore since William Lowe died. Why was he refused admittance to the prison hospital when he demanded to be admitted? When Lowe's case was diagnosed as viral pneumonia, why wasn't he taken to a bonafide doctor? Why wasn't he taken to a hospital equip [sic] to handle his illness as soon as it was diagnosed? Why did Silverman stop Snowden from having Lowe moved to a community hospital? Was Silverman trying to cover up his own neglect and improper handling of the case? WHY WAS A MAN STRUGGLING TO STAY ALIVE ADMINISTERED A STRONG DEPRESSANT DRUG AT SUCH A CRUCIAL MOMENT?

Evidently the teachings of Watergate were learned well by all levels of government officials. Silverman getting fired and Michaud destroying evidence are unequivocally cover-up tactics we've seen used before. By now cover-up tactics have been used constantly by the hospital and warden here to "clean up" the facts around Lowe's death. Once again we're seeing lies becoming the "viable alternative" to the truth.

A viral flu epidemic continues to grow here, and prisoners are still not receiving proper medical attention. Prisoners who work at the prison factory must report to work no matter how sick they are; upon their arrival to work "arrangements" are made for them to go to the hospital at two and three in the afternoon—after they put in six or seven hours of hard work first.

Most people disregard the facts surrounding a death like Lowe's. They push it to the side saying he was a prisoner, a criminal, a person who broke the "law" and got what he deserved. They'll never examine the pressures created by the economy that drive people to commit crime; nor do you hear people refer to prisoners as human beings. They do not understand that prisons are warehouses for the poor—and that the only difference between prisoners and wealthy people who commit larger-scale crimes, is that the wealthy can afford attorneys to find loopholes to gain them their freedoms.

Corruption runs rampant within this prison. In recent years $16,000 worth of new welding equipment, 115 power

lawn-mowers, 300 baby pigs, 67 milk cows and 32 sides of cooked beef turned up "missing." In the case of the lawn-mowers, prison guards searched prisoners' cells and (3′ x 2′) lockers for the machines. Prisoners and administrators alike know that it's absurd to think that prisoners could have stolen such large quantities of the items mentioned. But investigations are never carried out, and everything is merely written off as "inmate pilferage."

A few weeks ago we called for a full-scale investigation into Lowe's death, the hospital facilities and the lock up and transfer of the then more than 70 prisoners locked in segregation from the strike. Again we are asking people to send letters of protest to the officials listed below. We are seeking all the facts around Lowe's death; indictments against any persons guilty of malpractice; the full upgrading of the hospital facilities; administrative approval of the Prisoners' Council; and the release of those men still locked in segregation. Also in respect to the men in segregation, we are calling for the reinstatement of the good time taken from them; stop any punitive transfers, extra years added on to their sentences or their having to stay in segregation for any protracted periods of time. All they did was participate in a peaceful act of solidarity to protest and expose a grave injustice; to protest and expose a sordid mess; to protest and expose a murder of a fellow human being who died by the hands of a negligent hospital staff.

WILLIAM LOWE MOVEMENT

Surgeon General of the United States
Office of the Surgeon General
Washington, D.C.

Norman Carlson, Director
United States Bureau of Prisons
H.O.L.C. Building
101 Indiana Avenue, NW
Washington, D.C.

Warden C. L. Benson
Box 33
Terre Haute, Indiana 47808

To your congress spokesperson



[Interview Notes of David Saxner]

David Orr. Norman Silverman. Larry Snowden. I'm not familiar with any blacklist of Michaud's. At this time I've not been able to obtain the Surgeon General's representative's name. However, if you don't find that out while you are here tomorrow, I will find it out by the end of the week. As I said in my preceding letter, I am not sure what's happening with those in seg. I did get a message from General that they were being kept from the legal room in "L" Unit. Write him. I don't know his register number, but Calvin Bass will suffice. I'll look into the blacklist thing further. Now the rest...

No Black person in any key hospital position.

**Mr. X:**

Mr. X walks around the population with a swell on his stomach that measures between 8 to 12 inches. Preceding his "treatment" in the prison hospital his stomach had no swells or knots of any kind. His story:

"In the first week of June 1974, I went into the prison hospital for a check-up. The check-up was given by a Dr. Freed, a doctor contracted from the St. Anthony's Hospital in Terre Haute. At that time Dr. Freed advised me that I had a hernia (in the right groin) that should be removed; he also told me I had an umbilical hernia. Dr. Freed assured me that the umbilical hernia was a minor operation, and that I should have that corrected when I was being operated on for the hernia in my groin. I was apprehensive about having anything done to the umbilical hernia, because I had lived with it—and had done heavy labor work in prison factories—since 1967. Dr. Freed eventually convinced me to have the double operation.

"On July 22, 1974, Dr. Freed performed the operations as scheduled. This was done in the prison hospital.

"The operation seemed to be successful. I had no complaints after the surgery, save some of the conditions in the recovery room (surgery ward). For example, there was a lot of people walking in and out of the recovery room, making noise and causing confusion; I was forced to eat the same unbalanced diet served to the main population; and too many

people handled the food. It wasn't a clean environment, let alone a place to recover from an operation. (I've also been told that sheets are not cleaned frequently for the hospital patients, and this results in patients lying on dirty, stained sheets that could fester wounds. D.S.)

"Three days after the operation, on July 25, 1974, I started vomiting and my stomach swelled up. I could no longer keep any foodstuffs or liquids in my stomach. My digestive track stopped functioning, and consequently I was unable to use my bowels. They pumped my stomach for the next four days, fed me intravenously and shortly thereafter my digestive track was working again. I was given chicken concentrate (one can for two weeks, and was told that's all I'd get) and koolaid for my diet.

"I was then released from the hospital.

"A week after I got out of the hospital my stomach got hard; it began to abscess and then, at 4 a.m. one morning in my dormitory, it burst open. I was left in the dorm until 10:30 a.m., at which time I was finally taken to the hospital and treated. The MTA (I can't recall his name) cleaned and dressed the wound, then gave me some antibiotics. I left the hospital and never returned. I tend to the wound myself, and I refuse to let the hospital treat me any more. The hospital and staff do not ask or offer to provide me with further treatment. I haven't seen any one from the medical staff here since October, and since I'm due to be released in the next couple weeks I don't intend to go to the hospital for anything."

*John Mayberry:*

"For the last six weeks I've been going to the hospital for treatment of a bronchial condition. On my first visit to the hospital, John Hines, MTA, diagnosed my bronchitis as hepatitis, and then sent me on to Dr. Silverman, then the prison hospital doctor. Dr. Silverman told me I had an asthmatic problem that was at [sic] cause for my bronchitis, although I am certain I don't have any asthma whatsoever. Dr. Silverman took an X-ray and prescribed me two pills, Tylenol (for fever) and Tetral (to open up the congestion).



"A few days later I returned to the hospital. This time Walter Martin, an MTA, gave me some antibiotics. When I returned to hospital after taking the antibiotics for a while, and told MTA Martin that the antibiotics were bothering my stomach, I was taken off medication completely.

"For the following month I got no medication whatsoever.

"Then yesterday, February 3, I went back to see MTA Martin. I told Martin that I had bronchitis and wanted to see a doctor. Martin wanted to know why I thought I had bronchitis, and I told him because that's what I had been told ever since I had been coming down to the hospital. When Martin refused to give me medication for my condition, I demanded to see a doctor. Martin told me I just couldn't walk in and ask to see a doctor. Martin further asserted that he couldn't send any one back to see the doctor unless he found something wrong with the patient. I finally threatened to tear the hospital apart if I didn't see a doctor or receive some medication. When MTA Martin saw I was serious, he prescribed penicilin, nose drops, cough syrup, throat lozenges, salt and gave me a two day lay-in from work. If it wasn't for the fact that I was running a temperature and threatened to rip the hospital apart, I would have left the hospital with no medication."

*Everett Wallace, Jr.*

"When I first came to this prison last year (from the Federal Prison Hospital in Springfield, Missouri) I was getting 400 milligrams of throzine [sic] a day. I went to see D. Silverman shortly after I arrived here. At that time I was seeing things and had been extremely paranoid that I was going to get stabbed (I was only 24 years old and had no business being in a penitentiary-class institution to begin with). Dr. Silverman increased my daily dosage of thorazine from 400 to 800 milligrams.

"Not too long ago I was placed in the hospital here for infectious hepatitis. After being there (in the hospital) for three days, I called the MTA (name unknown). I told the MTA I was feeling weak and I needed some kind of food other than the regular mess hall food. The MTA agreed with me the food was not too good, especially for a sick person to

get healthy, but he also told me there was nothing he could do. He did mention, however, that the hospital would be getting a dietician eventually (no such thing to this date —D.S.). After a short while I was released from the hospital.

"A week after I got out of the hospital I got sick out at work, and I told my factory boss, Mr. Wicks, to call the hospital for me and make an appointment. The hospital told Mr. Wicks not to bother sending me to the hospital; that 400 milligrams would be waiting for me at the next medication call (we have to wait at a line for medication, if we get any or want something like a cold capsule, three times a day—7 a.m., 12 noon and 6:30 p.m. If you don't have a prescription card specifying a certain type of medication you can only go to the 7 a.m. call. This means if you get a headache or some other minor pain that requires some type of pill at, say, 10 a.m., you would have to wait until 7 a.m. the next morning to get a pill—D.S.). I wasn't taking any medication at this time, and without looking at me the hospital diagnosed my case and prescribed me with 400 milligrams of thorazine!

"Four weeks ago I went to see MTA Martin two days in a row. He told me that I wasn't feeling ill, that it was all in my head. On the third day in a row that I went to see him and tell him that I was ill, he again told me there was nothing wrong with me. I requested that I be given a test for hepatitis. I was, and the test proved to be negative.

"That night I was feeling bad. I went back down to the hospital and MTA Bill Walters took my temperature. It was running a little bit above normal. Walters gave me two tylenols, which I took. I went back to my cell and started to break out in a sweat. I was getting to the point where I could hardly move. I knew I couldn't go back to the hospital that night, so I just applied towels to my forehead.

"At 6:30 the next morning I made my way to the hospital. On my way there I was stopped by a Lieutenant Marvin Marcadis, who wanted to know where I was going. He told me that he could see that I wasn't feeling well. But, at the same time, he told me I couldn't go to the hospital until 8 a.m. I told him I couldn't wait. As soon as I got into the hospital I started to vomit. Soon my temperature was taken,



and it read 102 degrees. John Hines, MTA, refused to allow me admittance to the hospital when I made such a request. I had to go back to my cell."

*Mr. Y:*

"I was coming out of the visiting room a couple weeks ago and was taken to the hospital because I was suspected of entering contraband into the institution. Upon entering the hospital I was told I was going to have an X-ray taken of my groin area. I started to resist and asked Lieutenant James Harbert, who brought me to the hospital, what my rights were. The lieutenant replied that I had no rights, that I had lost them when I came in the door. When I began to resist from having the X-ray taken, Harbert and his goon-squad, comprised of seven prison guards, wrestled me onto a table to be X-rayed. J.D. Copher, an MTA, gave me the X-ray (there are only two people in the joint licenced to work the X-ray machine, one is Michaud, and the other is a prisoner. None of the MTA's are licenced [sic] for using the machine. To find out what they can and can't do, you should find a doctor or med student. D.S.).

"After Copher finished with the X-ray he told Harbert he couldn't be sure that there was contraband hidden in my anus. Harbert then asked me if I'd submit to a finger-wave. I said no. Harbert took off his glasses, called the goon-squad forward, dove at me, and then he and the squad "put" me on a table and strapped me down. Copher gave me the finger-wave (I don't think he can put his hands inside a body, only a doctor can do this—I think. D.S.) there was also a forced enema given after the finger-wave. And then to top it off a Lieutenant Patrick Koehane came in and asked me to sign a piece of paper stating that I was given all my rights before I was given the finger-wave and the enema!"

* * * * *

That's all I've done so far, brother. I will continue to get more info by the time you come on Friday. I am really curious to see what happens tomorrow on the tour. If General gets transferred, here is his mother's address: Calvin Bass, % Beatrice Cooper, 479 Conner Street, Detroit, Mi. 48215. If I gave you that before, forgive me—I'm a bit spaced out now, which is why the second half of this is messy. Soon.

2/4/75



David Saxner #28759-117
Box 33
Terre Haute, Indiana 47808
January 9, 1974

Arpiar Saunders, Attorney
National Prison Project
1346 Connecticut Street, NW
Washington, D.C. 20036

Dear Arpy:

This will be brief and to the point. Enclosed is a quick press release I did yesterday—it will give you some insight to what's happening here. Also enclosed is an important memo I would like you to xerox and keep for us (if you don't mind). The memo, though not dated, may be invaluable in the future.

There is a slight distortion in the article. There were slightly over 900 prisoners involved in the work stoppage; and there are only 1071 prisoners inside the joint—the reference I made to the 1400 prisoners included the farm's population (which also receives its medical "treatment" inside the prison hospital).

Yesterday a brother passed out in the factory—he was working with a 103 degree temperature. People who work in the factory cannot go straight to the hospital when they're sick. They have to report to their respective jobs first, then their bosses "arrange" for them to see the doctor—but it just so happens that all factory appointments, no matter how sick a prisoner may be, are scheduled for 2 and 3 p.m.; after the person has put in a good six or seven hours as a slave!

Forty more prisoners have been locked-up since I wrote the article. What would be the chances of filing a class action suit to have them released? Are there any cases affording prisoners the right to peaceful protest? Denying the right? Judge Dillin has been very kind to prisoners around here lately. What do you think? I'd also like to hear your opinion about whether or not we should urge the dead brother's family to file charges against the prison.

Can you please see that Brigitte Cooke and Lanier get copies of the press release. Also, tell Brigitte to send a copy

to Arthur. I'm thinking if he came down here to speak to the media we could rally some needed local support.

Let me hear from you as soon as possible. And remember to send the addresses of any attorneys in the area who you think could be helpful. We want to open up this place—we've got the issues and motivation and support to do it now. Take care.

Moving slowly,
David



Date: May 13, 1973

To: U.S. Federal Bureau of Prisons
From: Prisoner's Peoples Union/Inmates of Terre Haute Prison
Subject: Prison Labor Union

Dear Gentlemen:

"We want the right to bargain over wages, working conditions and hours".

*IDEALS AND PROPOSALS OF THE PRISONER LABOR UNION*

The Prisoners' Labor Union is a check and balance that can be instituted to secure and insure that a penal system does not dehumanize, but instead induces rehabilitation.

*Prisoners Labor Union Grievances*

I) We have been and presently are being ECONOMICALLY EXPLOITED. We are forced to supply (slave) labor for the Federal Prison Industry: Food Service/ Laundry/ Maintenance Jobs—So called Vocational Training/ Electric Shop/ Plumbing Shop; And receive virtually no salary; we are coerced into this employment by threats of delayed release, confinement in segregation or denial of ordinary privileges. The Inmate workers feel that they are entitled to a minimum wage. If workers or prisoners work they should have a right to work and be fairly paid for that work.

2) The Inmates are under some of the worse working conditions possible.

3) Inmates do not have a choice where they will work nor as to what job they will be specifically assigned. The classification board in assigning jobs, show little regard for the inmates wish as to what they feel would benefit them in preparation for their re-entry into society. We feel that it is imperative that the inmate have a say in the matter as to the job he performs.

a) Enact a method to replace the present classification system to better serve the qualifications of the inmate laborer.

4) The inmate is not entitled to any kind of workman's compensation normally given to employees. We feel that we have the right to have these compensations.

a) ACCIDENT INSURANCE: to insure the inmate against serious injury.

b) LIFE INSURANCE: in case of an inmates death he would be able to provide some degree of economic independence for the family.

c) MEDICAL INSURANCE: would not only compensate the inmate but would leave his wife and family covered as well.

d) Retirement BENEFITS: a long-term inmate having worked for many years is entitled to these benefits as well as the inmate incapable of holding a job through either old age or injury.

5) The handicapped inmate is one of the most neglected and forgotten prisoners in the penal system. There are no significant programs available to them.

*Structure for The Prisoners' Labor Union*

1) Establish a median income (monthly, yearly, etc.) for each classification of all prison labor.

2) The eradication of racism in job placement of minority ethnic nationalities.

3) Support legislation which would stimulate outside interests for prison labor; that would create new job opportunities for the inmate labor force.

4) Establish & broaden a more relevant vocational training program so it will appeal to a larger segment of the inmate labor force.

5) Increase in salaries of correctional staff to create a higher caliber of correctional employee.

6) Establish workman's compensation for all Federal Employed Prisoners.

7) Develop rehabilitative programs for the handicapped inmate.

8) Gain our human rights and privileges and show that we, too are HUMAN BEINGS.

9) Improve dangerous working conditions.



10) Stimulate the interest of private industry in the penal system.

11) Combat all forms of cruelty and injustices within the system.

*Basic Benefits to The Inmate*

1) Financially, an inmate laborer, leaving an institution, would be better equipped to adjust to society and less likely to commit another crime. Today he has no immediate means of physical survival.

2) Unionization can create an atmosphere which would instill essential requirements to an individual's personal growth, such as

a) A more positive attitude toward work.

b) The incentive to learn and succeed.

c) A comprehensive approach to self-rehabilitation.

d) Sense of responsibility.

e) Enable the inmate to overcome the guilt feeling of having left his wife and family.

f) Would lead to the quality of inmate identifying with the world and society around him.

3) Prisoners would think more in positive terms, having less time to cause trouble (according to corrections administration).

4) The opportunity to retain the attorney of their own choosing.

5) Further productivity by giving them money enough to buy a hobby, either for personal achievement, enjoyment or the feeling of usefulness.

6) Money can be used for investments to aid family security for the present or after release.

7) 'Learn' skills directly beneficial to them upon release.

8) Insure their health with better working conditions.

9) Allow the prisoner to fulfill past financial obligation while in prison: home, automobile, etc.

*FUTURE OBJECTIVES*

1) Inmate-public seminars to act as a major force in removing the "convict" stereotype from the public mind and create access to media through TV, press and radio.

2) Develop a Prisoner Credit Union.

3) Seek investment opportunities for inmates.

4) Create job referral programs for parolees and ex-convicts.

5) Set up inmate cooperatives, operated by ex-convicts.

6) Establish a "Guest House" for visiting families who must travel long distances.

7) Establish visiting programs for those inmates who do not have families.

8) Transportation service for prisoners visitors to and from various central points.

9) Educational scholarship fund program.

10) Upgrade the medical treatment within the institutions.

11) Upgrade the food and commissary.



BUREAU OF PRISONS
WASHINGTON, D.C. 20537
POLICY STATEMENT 7300.2C
SUBJECT: PRISONER'S MAIL BOX
8-20-74

1. *PURPOSE*. This statement of policy is to update and revise the current procedures pertaining to the operation of the Prisoner's Mail Box.

2. *DIRECTIVES*. This Policy Statment supersedes Policy Statement 7300.2B, dated August 7, 1972.

3. *POLICY*. It is the policy of the Bureau of Prisons to provide all inmates in the Bureau institutions the opportunity to write government officials who are not immediately responsible for their care, custody, and correction. All letters mailed through the Prisoner's Mail Box procedures will be neither opened nor inspected. All inmates may utilize this process to write to officials specified below to discuss any problem or situation which they feel cannot be solved with the assistance of institutional personnel or by the use of normal mail channels.

Inmates may address letters through the Prisoner's Mail Box to: the President and the Vice-president; the Attorney General; Director, Bureau of Prisons; Regional Director; Office of General Counsel and Review, Bureau of Prisons; members of the United States Board of Parole; the Pardon Attorney; the Surgeon General, U.S. Public Health Service; the Secretary of the Army, Navy and Air Force; United States Courts; members of the U.S. Senate and House of Representatives; and representatives, specified by name or title, of the news media (as defined by Policy Statement 1200.1A).

State prisoners that are boarded in Bureau institutions will be permitted to utilize the Prisoner's Mail Box to correspond with state officials concerning their problems. Letters to Governors, Attorneys General, Director of Departments of Corrections and sentencing Judges will be forwarded in accordance with standard procedure outlined in this policy statement.

4. *OPERATIONAL PROCEDURES*

a.(1) *Description.* The Prisoner's Mail Box will be placed in a central location or locations readily accessible to the inmate population. Each mail box will be plainly marked and a statement of purpose will be posted indicating a list of persons to whom mail may be sent. The statement will indicate that matters which should be taken up with institution officials will normally be returned to the institution for disposition. The inmates' original letter will be returned with their response from Regional Office personnel.

(2) The notice placed on each mail box will also include the following statement:

> "The contents of all correspondence placed in this box are the responsibility of the individual writer. Any material which violates postal laws or regulations, i.e., is obscene or lewd or contains threat of bodily harm, involves extortion or libel, includes contraband, or is intended to facilitate escape from legal custody may result in prosecution in a Federal Court."

(3) The above statement will be translated into Spanish to assist the large number of Spanish speaking inmates in our care.

b. *Collection.* A designated institutional staff member will collect the contents of each Prisoner's Mail Box on a daily basis, Monday through Friday. All mail addressed to the Bureau and Regional Office will be forwarded each day in an envelope plainly marked "Prisoner's Mail Box."

c. *Identification of Mail.* Inmates will not be required to place their name or any identifying mark on the envelopes but will be requested to address all mail as legibly as possible.

d. *Letters to Central Office.* All mail addressed to members of the Central Office staff of the Bureau of Prisons will be forwarded with other Prisoner's Mail Box letters to the Regional Office, but only the Director's name is to be placed on the notice posted with the mail box.

e. *Letters to the U.S. Courts.* All mail addressed to the U.S. Courts shall be separated from other Prisoner's Mail Box letters and forwarded directly to the addressee, but



with the envelope stamped as directed in paragraph "h" of this policy statement.

Mail addressed to the U.S. Attorneys, U.S. Probation Officers and Clerks of the Court will be forwarded to the addressee, but the notice posted above the mail box will be limited to U.S. Courts.

Legal documents such as petitions for writs of habeas corpus, motions to vacate sentence, requests for trial records, etc., will be processed as Special Purpose correspondence as provided for in Policy Statement 7300.1A dated March 16, 1972. For handling incoming mail see par. 6b, Policy Statement 7300.1A.

f. *Letters to Members of Congress.* All mail addressed to members of Congress will be separated from other Prisoner's Mail Box letters and be forwarded directly to the addressee but with the envelope stamped as directed in paragraph "h" of this policy statement. Letters to members of Congress will be sent to their Washington address and each institution will insure that a current Congressional Directory is available for ready reference by all inmates. Letters addressed to persons that you are unable to identify as members of Congress or letters which pose other unusual problems, will be forwarded to the Bureau for disposition. All inmates will be instructed that multiple letters to several members of Congress are likely to be less effective than will one letter to the Congressman of his choice. Follow-up letters are normally unnecessary and should not be written in less than one month. Letters to members of Congress may be sent as "Special Purpose" mail if the inmate so desires. For handling incoming mail see par. 6b, Policy Statement 7300.1A.

g. *Registered Letters.* Inmates will be allowed to send letters through Prisoner's Mail Box procedures as registered, certified or special delivery if they so desire and at their own expense. In order to do so they must identify themselves by name and register number so the proper procedure for handling mail of this type can be followed. Of course the letters may be mailed only to individuals authorized on the notice of the Prisoner Mail Box. The letter will still remain sealed and will be processed in accordance with each institution's proce-

dures for the handling of registered mail. The handling of Commissary Form #24s will be consistent with the procedures outlined in Policy Statement 15263.

h. *Transmittal Stamp.* Each institution will have a stamp made includes the following statement: "The enclosed letter was processed through special mailing procedures for forwarding to you. The letter has been neither opened nor inspected. If writer raises a question or problem over which this facility has jurisdiction, you may wish to return the material for further information and clarification. If the writer encloses correspondence for forwarding to another addressee, please return the enclosure to the above address."

This revised procedure will eliminate the stapling of the old transmittal slip to the inmate's envelope and eliminate the cost and time factor of readdressing another envelope. This message is to be stamped directly on the back side of the inmate's original envelope.

It is imperative that this message be stamped in a clear and legible manner on each envelope. An example of this stamp is shown on attachment 1.

5. *ACTION REQUIRED.* The procedures outlined above become effective immediately. Institution policy statements referring to Prisoner's Mail Box should be amended in accordance with these procedures and a copy sent to the Regional Director.

/S/ Norman A. Carlson
Director, Bureau of Prisons
Commissioner, Federal Prison Industries, Inc.



EXAMPLE OF TRANSMITTAL STAMP ON BACK SIDE OF ENVELOPE

P.O. BOX 500
STEILACOOM, WASHINGTON 98388

DATE _____

The enclosed letter was processed through special mailing procedures for forwarding to you. The letter has been neither opened nor inspected. If the writer raises a question or problem over which this facility has jurisdiction, you may wish to return the material for further information or clarification. If the writer encloses correspondence for forwarding to another addressee, please return the enclosure to the above address.

# Supreme Court of the United States

No. 84-732

THEODORE CLEAVINGER, MARVIN MARCADIS, AND TOM P. LOCKETT, PETITIONERS,

*v.*

DAVID SAXNER AND ALFRED CAIN, JR.

ORDER ALLOWING CERTIORARI. Filed *February 19, 1985.*

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Seventh Circuit* is granted.

Justice Powell took no part in the consideration or decision of this petition.

(5)

Office-Supreme Court, U.S.
FILED
MAY 6 1985
ALEXANDER L. STEVAS

No. 84-732

# In the Supreme Court of the United States

OCTOBER TERM, 1984

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THEODORE CLEAVINGER, ET AL., PETITIONERS

*v.*

DAVID SAXNER AND ALFRED CAIN, JR.

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE PETITIONERS

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REX E. LEE
*Solicitor General*

STEPHEN S. TROTT
*Assistant Attorney General*

KENNETH S. GELLER
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SAMUEL A. ALITO, JR.
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GLORIA C. PHARES
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*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

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448P

## QUESTION PRESENTED

Whether members of an Institution Discipline Committee, who adjudicate cases in which prison inmates are charged with rules infractions, are entitled to absolute immunity from personal damages liability for actions taken in that quasi-judicial capacity.

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# In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-732

THEODORE CLEAVINGER, ET AL., PETITIONERS

*v.*

DAVID SAXNER AND ALFRED CAIN, JR.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE PETITIONERS

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 727 F.2d 669. The opinions of the district court reinstating petitioners as defendants in this action (J.A. 23-24) and denying petitioners' motion for judgment notwithstanding the verdict (Pet. App. 27a-34a) are unreported.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 35a) was entered on February 13, 1984. A petition for rehearing was denied on June 8, 1984 (Pet. App. 36a). On August 27, 1984, Justice Stevens extended

the time for filing a petition for a writ of certiorari to and including November 5, 1984. The petition was filed on that date and was granted on February 19, 1985 (J.A. 102).

## STATEMENT

1. In January 1975, prisoners in the federal correctional institution at Terre Haute, Indiana, engaged in a two-day strike to protest an inmate's death in the prison hospital (Pet. App. 2a). On February 14, 1975, respondents, who were inmates at Terre Haute, were cited in separate incident reports with encouraging other prisoners to engage in another work stoppage (*id.* at 3a; J.A. 50, 52).[1] The following day, each respondent received a copy of the incident report as required by the Bureau of Prisons Policy Statement (BOP Policy Statement) 7400.5C (Oct. 4, 1974) (J.A. 25-49; Pet. App. 3a; J.A. 36, 50, 52). In accordance with Bureau of Prisons practice (*id.* at 34-35), respondent Saxner was given and signed a notice explaining his rights at the disciplinary hearing to be held before the Institution Discipline Committee (IDC).[2] These rights included the right to advance written notice of the charge, the right to be represented by a staff member of his choice, and the right, except where institutional safety would be impaired, to attend the hearing, to present testimony and documentary evidence, and to receive a

[1] Respondent Saxner was serving a four-year sentence for smuggling marijuana, and respondent Cain was serving a five-year sentence for conspiracy to violate the firearms laws (see I Tr. 4, 98).

[2] The record does not reflect whether respondent Cain received a similar notice at that time (Pet. App. 3a).



written explanation of the IDC's decision. Pet. App. 3a; J.A. 54; see *id.* at 36-38. Following issuance of the incident reports, respondents were placed in administrative segregation (Pet. App. 4a).[3]

Respondent Saxner appeared before the IDC on February 21, 1975. On that day, the IDC was composed of petitioner Cleavinger, an associate warden; petitioner Marcadis, a correctional supervisor; and petitioner Lockett, chief of case management. Pet. App. 3a.[4] Saxner was accompanied by a staff counselor, Ralph Smith, whom Saxner had selected to represent him at the hearing. After reading the charge and reviewing Saxner's rights, the IDC introduced the incident report and three documents found in Saxner's cell. The first document (J.A. 91) was a cover letter from Saxner to Arpiar Saunders of the National Prison Project acknowledging that Saxner had written an enclosed "press release" entitled "Prisoners at Terre Haute Seek an Investigation" (*id.* at 81). Among other things, the press release advocated administrative approval of a prisoners union and amnesty for those who had participated in the strike (*id.* at 84). The letter also requested that Saunders keep an "important" enclosed memo entitled "Ideals and Proposals of the Prisoner Labor

[3] Administrative segregation results in a prisoner's temporary removal from the general inmate population (II Tr. 226; 28 C.F.R. 541.20).

[4] IDCs at Terre Haute were generally composed of three members. By regulation, at least two were senior correctional officers with the rank of department head or higher. The third member was normally a less senior member of the correctional staff. Staff members who witnessed the incident were excluded from membership on the IDC unless application of that rule would preclude the impanelling of a tribunal (Pet. App. 3a n.3; J.A. 26 ¶ 4; see 28 C.F.R. 541.16(b)).

Union" (*id.* at 93). At the hearing, Saxner admitted that he had written the press release and had mailed it to persons outside the prison without authorization (*id.* at 60, 71). No guards or inmates were called as witnesses, but Saxner was permitted to testify on his own behalf and to introduce affidavits of several inmates. Pet. App. 3a. The IDC denied Saxner's request to permit certain inmates to testify that he had not encouraged them to stop working, because their testimony would have been cumulative (*id.* at 3a n.4).

After adjourning and considering the evidence, the IDC found respondent Saxner guilty of encouraging a work stoppage, in violation of prison Rule 255 (J.A. 30, 57). In addition, based upon the documents found in Saxner's cell and his admissions at the hearing, Saxner was also found guilty of unauthorized use of the mail, in violation of Rule 701 (*id.* at 31, 47), and possession of contraband (*i.e.*, inflammatory material advocating an illegal prison union), in violation of Rule 208 (*id.* at 30, 57). The IDC ordered that Saxner be placed in administrative detention and forfeit 84 days of "good time" and recommended his transfer to another institution. Pet. App. 4a; J.A. 57.[5]

Respondent Cain's IDC hearing occurred the same day before the same officers (Pet. App. 4a). He was represented at the hearing by staff representative J.R. Alvarado (J.A. 64). The IDC advised Cain of

[5] Respondent Cain was assigned the last cell in L-Block, the unit that ordinarily housed those in administrative detention. As a result, respondent Saxner was assigned to the first cell in G-Block, the unit usually reserved for disciplinary segregation but used for administrative detention when L-Block was full (II Tr. 234-235). After seven days, when space became available, Saxner was moved to L-Block (I Tr. 46).



his rights and then produced the incident report, which contained the particulars of the work stoppage charge. Two documents found in Cain's cell—Saxner's letter to Saunders and the manuscript "Ideals and Proposals of the Prisoner Labor Union"—were also introduced. Pet. App. 4a; J.A. 81, 91. Cain testified and denied that he had encouraged other inmates not to work. He also demanded the opportunity to cross-examine his accusers. I Tr. 102, 104, 105. No other witnesses were called. At the conclusion of the hearing, the IDC found Cain guilty of encouraging a work stoppage and of possessing contraband, *i.e.*, "inflammatory material * * * supporting disruptive conduct in the institution." Pet. App. 4a; J.A. 65. The IDC ordered that Cain be confined in administrative segregation and forfeit 96 days of good time and recommended his transfer to another institution. *Ibid.*

2. In accordance with the BOP Policy Statement (J.A. 40 ¶ 10; see 28 C.F.R. 541.19), each respondent was informed of his appeal rights at the conclusion of the IDC hearing (Pet. App. 4a). Respondents appealed the IDC decisions to the warden, who provided virtually all of the relief they requested. The warden ordered respondents' release from administrative segregation, restored the forfeited good time, and directed that respondents' records carry a notation that the incident should not adversely affect their consideration for parole. Both respondents were released into the general prison population on March 21, 1975 (I Tr. 60; J.A. 75). The warden refused, however, to expunge respondents' records. Pet. App. 4a; I Tr. 61, 62, 123; J.A. 74, 77.

In accordance with the further appeal provisions of the BOP Policy Statement (J.A. 41), respondents appealed this one adverse ruling to the Regional Di-

rector of the Bureau of Prisons, and in April 1975, based upon the Regional Office's recommendation, the records of both respondents were expunged. Pet. App. 4a-5a; J.A. 79, 80. Respondent Saxner was paroled and released in April 1975; respondent Cain was granted parole in June 1975 and released in December 1975 (I Tr. 63, 125).

3. Meanwhile, in March 1975, respondents had brought suit in the United States District Court for the Southern District of Indiana against petitioners and other prison officials in their individual capacities.[6] Respondents' complaint, as amended, alleged that the defendants had violated respondents' rights under the First, Fourth, Fifth, Sixth, and Eighth Amendments (J.A. 12-22). See *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). Respondents sought declaratory and injunctive relief and a total of $75,000 in compensatory damages (Pet. App. 5a; J.A. 22).

Prior to trial, the district court granted petitioners' motion to dismiss the complaint on the ground that their function as IDC hearing officers entitled them to absolute immunity from personal damages liability. Nearly two years later, however, the court reinstated the suit in light of the Seventh Circuit's decision in *Mary & Crystal* v. *Ramsden*, 635 F.2d 590 (1980), which held that members of a disciplinary committee at a state juvenile facility were entitled to only qualified immunity. Pet. App. 5a; J.A. 23-24.

After reinstatement of the complaint, the case was tried to a jury in April 1981. In response to special interrogatories, the jury found that petitioners had

[6] Also named as defendants were the warden (Charles Benson) and the administrative supervisor (C.D. Wilson) (Pet. App. 3a n.3).



violated respondents' Fifth Amendment due process rights. Pet. App. 5a.[7] The jury awarded each respondent $4500 as compensatory damages (*id.* at 5a, 30a).

The district court denied petitioners' motion for judgment notwithstanding the verdict (Pet. App. 27a-34a). The court appears to have found (*id.* at 29a-30a) that respondents' due process rights had been violated because (1) respondents were found guilty of infractions for which they had not received prior notice, (2) respondents were not allowed to call certain witnesses, and (3) the IDC relied on hearsay in support of the charges. Petitioners appealed, contending among other things that they were entitled to absolute immunity.[8]

[7] Judgment was entered in favor of the other defendants (see note 6, *supra*). Respondents did not contest this aspect of the judgment on appeal.

[8] The sole question raised in our petition is whether IDC members are entitled to absolute immunity. We have not challenged—but do not concede—that petitioners violated any clearly established constitutional rights. As noted above, the judgments against petitioners were apparently based on three alleged violations of due process. One of these—the failure to call live witnesses in support of the charges (see Pet. App. 30a)—was no violation at all. *Baxter* v. *Palmigiano*, 425 U.S. 308, 320-323 (1976); *Wolff* v. *McDonnell*, 418 U.S. 539, 567-569 (1974). The district court also appeared to fault the IDC (Pet. App. 29a-30a) for refusing to permit respondents to call defense witnesses whose testimony the IDC believed would be cumulative. This ruling did not constitute a clear violation of the holding in *Wolff* (418 U.S. at 566) that inmates charged with disciplinary infractions "ordinarily" must be given "the right to present evidence" but do not possess "the unrestricted right to call witnesses from the prison population." Compare *Real* v. *Superintendent, Massachusetts Correctional Institution*, 390 Mass. 399, 456 N.E.2d 1111 (1983) (due process

4. The court of appeals affirmed by a divided vote (Pet. App. 1a-26a). The majority opinion, written by Judge Wood and joined by Judge Cudahy, held (*id.* at 1a-2a) that petitioners' claim of absolute immunity was foreclosed by prior Seventh Circuit decisions denying such immunity to state correctional officers serving in a similar capacity. See *Redding* v. *Fairman*, 717 F.2d 1105, 1117 (1983), cert. denied, No. 83-980 (Feb. 21, 1984); *Chavis* v. *Rowe*, 643 F.2d 1281, 1288, cert. denied, 454 U.S. 907 (1981); *Mary & Crystal* v. *Ramsden*, *supra*.[9]

Judge Celebrezze, sitting by designation, dissented. In his view, the court of appeals failed to follow this Court's analysis of the absolute immunity issue in *Butz* v. *Economou*, 438 U.S. 478 (1978). Under

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requires support in record of prison disciplinary proceeding for denial of prisoner's request to call witnesses), cert. granted *sub nom. Ponte* v. *Real*, No. 83-1329 (Oct. 1, 1984).

The final defect found by the district court was the IDC's failure to provide adequate notice of the charges of possessing contraband and unauthorized use of the mail. But while an inmate's right to 24 hours' notice of disciplinary charges was established in *Wolff*, it is at least arguable that *Wolff* does not apply to the situation here. In this case, the evidence supporting the new charges was originally introduced to prove the charges in the incident reports. Respondent Saxner then admitted that he had committed the additional offenses; and in any event, respondents' possession of the documents was essentially incontrovertible. Moreover, the new charges were no more serious than those in the incident reports, and there is no indication that the new charges resulted in the imposition of any additional punishment.

[9] The court of appeals also stated (Pet. App. 7a) that the damages awards might be "somewhat excessive," but it refused to disturb them. In addition, the court rejected respondents' cross-appeal of the district court's order denying them attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412 (Pet. App. 7a-9a).



*Economou*, Judge Celebrezze contended, an official is entitled to absolute immunity if (1) his decisions are "functionally comparable" to those of a judge, (2) the controversies he resolves are "sufficiently intense to spawn harassing or intimidating litigation," and (3) "the adjudicatory process over which the official presides contains sufficient safeguards to lessen the 'need for individual suits to correct constitutional error' " (Pet. App. 18a-19a (footnote omitted), quoting *Economou*, 438 U.S. at 512).

IDC members, Judge Celebrezze maintained, meet all of these requirements. He noted (Pet. App. 22a) that they perform "the classic judicial function" of "determin[ing] whether an accused person is guilty or innocent of the charges brought against him." He also pointed out (*id.* at 23a) that IDC members face a severe threat of harassing or intimidating litigation, since "[t]he ability of prisoners to generate litigation is substantial and well documented." Finally, he argued (*ibid.*) that IDC procedures are sufficiently formal to assure that any constitutional error will either be avoided entirely or corrected in the course of the proceeding.

In response to Judge Celebrezze's dissent, the majority opinion stated (Pet. App. 2a n.2) that it "recognize[d] and respect[ed]" his "thoughtful contrary analysis" and added: "His arguments suggest that in due time the issue may merit reconsideration in this circuit." In view of this statement in the majority opinion, Judge Cudahy wrote a concurring opinion in support of the prior Seventh Circuit decisions (Pet. App. 10a-16a). Judge Cudahy stated (*id.* at 10a) that the activities and procedures of the IDC officers are "so dissimilar in form and substance from those of judges granted absolute immunity that reli-

ance on an all-encompassing similarity of quasi-judicial function will not wash." He argued (*id.* at 10a-12a) that IDC proceedings lack the procedural formality of judicial and agency adjudicative proceedings. He also contended (*id.* at 14a-15a) that "[i]t would be poor policy to extend absolute immunity to these defendants" because "they are accorded adequate protection against harassment by the enlarged safeguards of qualified immunity as announced in *Harlow* [v. *Fitzgerald*, 457 U.S. 800 (1982)]."

Petitioners' request for rehearing en banc was denied, with four of the nine active judges voting for en banc review (Pet. App. 36a).

## SUMMARY OF ARGUMENT

When a federal inmate is charged with a serious infraction of prison rules, the charges are adjudicated by an Institution Discipline Committee, a three-person tribunal composed of specially trained senior prison officials. IDC members unquestionably perform a quasi-judicial role. Accordingly, they are entitled to absolute immunity against suits for damages.

This Court has long held that judges are absolutely immune for judicial acts falling broadly within their jurisdiction. This immunity applies regardless of the judge's alleged motives, the correctness of his actions, or the informality of the procedures. Judges must decide difficult and controversial cases that arouse intense feelings in the litigants. If disappointed litigants could sue for damages based on perceived defects in the court proceedings, the burden of defending such suits and the risk of an adverse judgment would be intolerable. Fearless and independent decisionmaking would be subverted.



This Court has also recognized that certain individuals, such as grand jurors and administrative law judges, perform functions comparable to those of a judge and face an equivalent threat of harassing or retaliatory litigation. Consequently, they too are clothed in absolute immunity from personal damages liability. Likewise, other essential participants in the judicial process, such as prosecutors and witnesses, have absolute immunity because liability to suit for damages would undermine the proper performance of their sensitive and important responsibilities.

These precedents amply support absolute immunity for IDC members. IDC members indisputably perform a quasi-judicial function: they adjudicate cases and in doing so must receive proof, assess the credibility of witnesses, weigh the evidence, and render a final written decision.

IDC adjudications play a vital role in maintaining prison discipline and security and thus in protecting both inmates and staff. Performance of this arduous and thankless task would be immeasurably more difficult if members of disciplinary tribunals were subject to suit for damages for their every procedural misstep. Prison discipline often arouses intense emotions; prisoners are prodigious litigators; and the flexible nature of due process requirements in the prison disciplinary setting offers substantial latitude for the assertion of due process claims. In addition, prison officials generally have modest financial resources. Hence, if IDC members could be held personally liable for damages few prison officials would willingly serve; fair and disinterested adjudication would be gravely compromised; and institutional order and safety would be jeopardized.

It is true that IDC proceedings lack some of the procedural attributes of trials and formal adminis-

trative adjudications. But this Court has recognized that the practicalities of prison administration justify more informal procedures. The Court has also recognized that an adjudication is no less judicial or quasi-judicial, and thus no less deserving of absolute immunity, because practical considerations require expeditious action or procedural informality. Thus, judges conducting summary proceedings, such as issuance of a search warrant or temporary restraining order, are entitled to absolute immunity, as are grand jurors and prosecutors.

In any event, IDC proceedings contain many safeguards to ensure fair adjudication. An inmate has the right to notice and the assistance of a lay advocate and the right to attend the proceedings and to put on a defense. A detailed record of the proceedings is kept; the IDC hands down a written decision; and the inmate is entitled to three levels of administrative review and to court review under 28 U.S.C. 2241. These remedies are sufficient to protect inmates' procedural rights and obviate any need for an additional damages remedy against IDC members.

Finally, IDC members need absolute, not just qualified immunity, for the same reasons as judges and other officials who perform quasi-judicial roles. Qualified immunity would provide inadequate protection against the severe burdens and risks of litigation faced by IDC members, and would be insufficient to ensure proper functioning of the prison disciplinary system.



## ARGUMENT

### MEMBERS OF A PRISON INSTITUTION DISCIPLINE COMMITTEE ARE ENTITLED TO ABSOLUTE IMMUNITY FROM PERSONAL DAMAGES LIABILITY FOR ACTIONS TAKEN IN THAT QUASI-JUDICIAL CAPACITY

#### A. Judges And Officials Who Perform Quasi-Judicial Functions Are Entitled To Absolute Immunity

1. "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction." *Pierson* v. *Ray*, 386 U.S. 547, 553-554 (1967). This Court recognized the pressing need for such immunity more than a century ago, holding that judges are absolutely immune for their judicial conduct unless they act in the "clear absence of all jurisdiction." *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872). "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority." *Stump* v. *Sparkman*, 435 U.S. 349, 356 (1978). Nor is a judge stripped of this protection when he conducts proceedings that lack the full-blown procedural safeguards associated with trials or required by due process. *Id.* at 355, 360-363.

In *Bradley* v. *Fisher*, *supra*, this Court addressed a claim for damages against George P. Fisher, a District of Columbia judge, by Joseph H. Bradley, a lawyer who had represented John H. Suratt, charged with the murder of President Lincoln. After the jury was unable to reach a verdict in the Suratt trial, Judge Fisher discharged the jury and summarily struck Bradley's name from the roll of attorneys of the Supreme Court of the District of Columbia, based on an incident that had occurred during the trial.

Affirming the judgment below in favor of Judge Fisher, this Court held that a federal judge may not be held accountable in damages for a judicial act taken within his court's jurisdiction. Such immunity applies, the Court concluded (80 U.S. (13 Wall.) at 347), "however erroneous the [judge's] act may have been, and however injurious in its consequences it may have proved to the plaintiff." The Court added (*ibid.*) that "this exemption of the judges from civil liability [cannot] be affected by the motives with which their judicial acts are performed."

The *Bradley* Court explained that judges must have absolute immunity in order to ensure the proper functioning of the judicial process. The Court noted (80 U.S. (13 Wall.) at 348) that "[c]ontroversies involving not merely great pecuniary interests, but the liability and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in [the] courts." "Yet," the Court observed (*ibid.*), "it is precisely in this class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge. Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge." The Court therefore concluded (*id.* at 347):

> [I]t is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful.



In *Pierson* v. *Ray*, 386 U.S. 547 (1967), the Court held that the same absolute immunity shielded a municipal police judge who was sued for damages under 42 U.S.C. 1983 by clergymen who alleged that the judge had unconstitutionally convicted them for a peaceful protest of racial segregation. Writing for the Court, Chief Justice Warren stated (386 U.S. at 554) that common law judicial immunity applied in suits under Section 1983 and again stressed that such immunity was essential to protect the integrity of the judicial process.

The Court once more adhered to these principles in *Stump* v. *Sparkman*, 435 U.S. 349 (1978), which held that an Indiana judge was immune from suit for damages for ordering the sterilization of a teenage girl in an ex parte proceeding, without a hearing, without notice to the girl, and without the appointment of a guardian ad litem. This Court found "no merit to [the] argument that the informality with which [the judge] proceeded rendered his action nonjudicial and deprived him of his absolute immunity" (*id.* at 362-363 (footnote omitted)). Indeed, the Court approvingly described a Fifth Circuit decision extending absolute immunity to a state judge who, at the time of the contested action (jailing a defendant's parents for contempt when they allegedly entered his office to deliver fresh clothes for their son), " 'was not in his judge's robes, * * * was not in the courtroom itself, and * * * may well have violated state and/or federal procedural requirements regarding

contempt citations.'" *Id.* at 361, quoting *McAlester* v. *Brown*, 469 F.2d 1280, 1282 (1972).

The *Stump* Court also found that neither the ex parte nature of the proceedings nor the insulation of the judge's decision from appellate correction altered the settled rule of absolute immunity (435 U.S. at 363 n.12):

> Courts and judges often act *ex parte*. They issue search warrants in this manner, for example, often without any "case" having been instituted, without any "case" ever being instituted, and without the issuance of the warrant being subject to appeal. Yet it would not destroy a judge's immunity if it is alleged and offer of proof is made that in issuing a warrant he acted erroneously and without principle.

2. The same immunity enjoyed by judges has been extended to others who perform quasi-judicial functions. "[This Court's] cases have followed a 'functional' approach to immunity law." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 810 (1982); see also *Briscoe* v. *LaHue*, 460 U.S. 325, 342 (1983). Immunity results from function, not from rank or title or "location within the Government." *Butz* v. *Economou*, 438 U.S. 478, 511 (1978). "Judges have absolute immunity * * * because of the special nature of their responsibilities." *Ibid.* See also *Harlow* v. *Fitzgerald*, 457 U.S. at 810-811 (emphasis added) ("We have recognized that the *judicial* * * * *function*[] require[s] absolute immunity."). Accordingly, absolute immunity has been extended to those who, while not judges in rank or title, perform functions broadly comparable to those of a judge.

The immunity of grand jurors, for example, has roots nearly as deep as that of judges. *Imbler* v. *Pachtman*, 424 U.S. 409, 423 n.20 (1976). This immunity is based on "the functional comparability of their judgments to those of a judge." *Ibid*; see also *Butz* v. *Economou*, 438 U.S. at 509-510. Yet grand jury proceedings are characterized by few of the procedural safeguards associated with trials and most other court proceedings. They are secret [10] and nonadversarial; [11] they are not governed by the rules of evidence or procedure; [12] and their decisions are largely immune from any type of judicial review. See, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338, 345 (1974); *Lawn* v. *United States*, 355 U.S. 339 (1958); *Costello* v. *United States*, 350 U.S. 359 (1956).

Federal hearing examiners and administrative law judges have likewise been recognized to possess absolute immunity because "[t]here can be little doubt that the role of the modern federal hearing examiner or administrative law judge * * * is 'functionally comparable' to that of a judge." *Butz* v. *Economou*, 438 U.S. at 508-514. In reaching this conclusion, the Court cited both the "fractious" quality of much administrative litigation (*id.* at 513) and the procedural safeguards in the Administrative Procedure Act, 5 U.S.C. (& Supp. I) 551 *et seq.* However, the Court did not indicate that such safeguards were essential to its decision—a matter we will discuss in greater detail (pages 28-30, *infra*).

In accordance with the principles laid down in this Court's decisions, the courts of appeals have held that other officials performing quasi-judicial roles are

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[10] Fed. R. Crim. P. 6(e)(2) and (3).

[11] *United States* v. *Calandra*, 414 U.S. 338, 343-344 (1974).

[12] *Calandra*, 414 U.S. at 343.

shielded by absolute immunity. Perhaps most relevant for present purposes are parole board members, who, like IDC members, adjudicate large numbers of prisoner cases. As the Ninth Circuit observed in *Sellars* v. *Procunier*, 641 F.2d 1295, 1303, cert. denied, 454 U.S. 1102 (1981):

> We believe that parole board officials perform functionally comparable tasks to judges when they decide to grant, deny, or revoke parole. The daily task of both judges and parole board officials is the adjudication of specific cases or controversies. Their duty is often the same: to render impartial decisions in cases and controversies that excite strong feelings because the litigant's liberty is at stake. They face the same risk of constant unfounded suits by those disappointed by the parole board's decisions.
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> * * * If parole board officials had to anticipate that each time they rejected a prisoner's application for parole, they would have to defend that decision in federal court, their already difficult task of balancing the risk involved in releasing a prisoner whose rehabilitation is uncertain against the public's right to safety would become almost impossible. Furthermore, time spent in depositions and on the witness stand defending their actions would leave these overburdened public servants with even less time to perform their crucial tasks.

Accord, *Trotter* v. *Klincar*, 748 F.2d 1177, 1181-1183 (7th Cir. 1984); *Evans* v. *Dillahunty*, 711 F.2d 828, 830-831 (8th Cir. 1983); *United States ex rel. Powell* v. *Irving*, 684 F.2d 494 (7th Cir. 1982); *Douglas* v. *Muncy*, 570 F.2d 499 (4th Cir. 1978); *Johnson* v. *Wells*, 566 F.2d 1016 (5th Cir. 1978); *Thompson* v.



*Burke*, 556 F.2d 231, 237-240 (3d Cir. 1977) (absolute immunity for "adjudicatory" but not "administrative" functions); *Pope* v. *Chew*, 521 F.2d 400 (4th Cir. 1975); *Cruz* v. *Skelton*, 502 F.2d 1101 (5th Cir. 1974).

3. So great is the need to insulate judicial and quasi-judicial processes from extraneous influences that this Court has extended absolute immunity to essential participants in the judicial process—such as prosecutors and witnesses—who perform roles very different from that of a judge.

In *Yaselli* v. *Goff*, 275 U.S. 503 (1927), the Court, in a per curiam opinion, affirmed a decision of the Second Circuit holding that a federal prosecutor was absolutely immune from suit for damages for malicious prosecution. *Yaselli* v. *Goff*, 12 F.2d 396 (1926). In *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), similar immunity was extended to a state prosecutor who was sued for allegedly procuring a conviction by knowingly introducing perjured testimony and suppressing exculpatory evidence. Echoing the reasoning of its prior decisions on judicial immunity, the Court explained (*id.* at 424-426 (citations omitted)):

> A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. Further, if the prosecutor could be made to answer in court each time such a person charged

him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.

> Moreover, suits that survived the pleadings would pose substantial danger of liability even to the honest prosecutor. * * * Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.

In holding that prosecutors are clothed with absolute immunity comparable to that of judges, the Court was surely aware that prosecutorial decisionmaking is not characterized by any of the procedural formalities of trials. For example, in deciding whether to present a case to a grand jury, a prosecutor exercises broad and generally unreviewable discretion. See *Heckler* v. *Chaney*, No. 83-1878 (Mar. 20, 1985), slip op. 9 (citing cases). Nor is he bound by procedural or evidentiary rules. The Court must also have been aware that the opportunity to challenge a conviction on direct appeal or collateral attack offers no sure redress for many commonly alleged types of prosecutorial abuse, including the wrongs claimed in *Imbler* itself.

Witnesses, including police officers, are likewise "integral parts of the judicial process" and are accordingly shielded by absolute immunity as well. *Briscoe* v. *LaHue*, 460 U.S. at 335. As the Court noted in *Briscoe* (*id.* at 343), "[s]ubjecting government officials, such as police officers, to damages liability under § 1983 for their testimony might under-



mine not only their contribution to the judicial process but also the effective performance of their other public duties."

4. In sum, this Court's cases make clear that absolute immunity from suit for damages protects judges, officials performing quasi-judicial functions, and persons who play integral parts in the judicial process. The central focus of these cases has been on the functions performed by the individuals seeking immunity and their practical need for immunity, not on their ranks or titles. Nor has the focus been on the procedural formality of their activities, as is illustrated by *Stump* and the cases recognizing absolute immunity for grand jurors and prosecutors. The Court's cases teach that absolute quasi-judicial immunity shields an official if (a) he performs an adjudicatory function comparable to that of a judge, (b) this function is of sufficiently great public importance, and (c) the proper performance of that function would be subverted if the official were subject to individual suit for damages.

### B. Institution Discipline Committee Members Perform A Vital Quasi-Judicial Function That Would Be Seriously Impaired Without The Protection Of Absolute Immunity From Personal Damages Liability

1. a. Members of an Institution Discipline Committee perform what is indubitably a quasi-judicial function, and accordingly they are entitled, while serving in that capacity,[13] to the same immunity as

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[13] This Court has held that prison officials have only qualified immunity when performing the administrative task of handling prisoner mail. *Procunier* v. *Navarette*, 434 U.S. 555 (1978). That holding does not control the present case, which concerns the immunity of prison officials performing the

judges, grand jurors, prosecutors, and administrative law judges. As the dissenting judge below observed (Pet. App. 22a), "IDC members are involved in the classic judicial function: they are required to determine whether an accused person is guilty or innocent of the charges brought against him." See BOP Policy Statement ¶ 9(b) (J.A. 36); see also 28 C.F.R. 541.16 (c); *Wolff* v. *McDonnell*, 418 U.S. 539, 571 (1974). In carrying out this responsibility, IDC members, like judges and ALJs, hear testimony and receive other proof, assess the credibility of witnesses, weigh the evidence, and render a final written decision.[14] See pages 30-32, *infra*.

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specialized function of adjudicating disciplinary cases. See, *e.g.*, *Briscoe* v. *LaHue*, 460 U.S. at 342 & n.28 (footnote omitted) ("[I]mmunity analysis rests on functional categories, not on the status of the defendant."); *Harlow* v. *Fitzgerald*, 457 U.S. at 810; *Butz* v. *Economou*, 438 U.S. at 511; *Imbler* v. *Pachtman*, 424 U.S. at 430-431 (prosecutor absolutely immune for prosecutorial, but not necessarily for administrative, activities). See also *Ward* v. *Johnson*, 690 F.2d 1098, 1109 (4th Cir. 1982) (en banc).

Because immunity depends on the particular function being performed by the official at the time of the contested action, respondents' contention (Br. in Opp. 15-17) that petitioners are not entitled to absolute immunity because they had responsibilities in addition to serving on IDCs is clearly misdirected.

[14] Respondents have argued (Br. in Opp. 15-17) that petitioners did not serve in a quasi-judicial capacity because one of the IDC members allegedly participated in the investigation, because the IDC members questioned respondents at the hearings, and because the IDC in effect initiated new charges against respondents during the course of the proceedings or deliberations. We do not agree that these activities are necessarily incompatible with a quasi-judicial role. For example, grand juries, which are quasi-judicial bodies, conduct investigations and make charging decisions; and both grand jurors and trial judges routinely question witnesses. In any event, the activities claimed by respondents to lie beyond the bounds of quasi-judicial behavior did not form the basis for the due process violations found in this case and are thus irrelevant for present purposes.



b. The societal importance of this dispute resolution function is readily apparent. As the Court has recognized, "[t]he administration of a prison * * * is 'at best an extraordinarily difficult undertaking.'" *Hudson* v. *Palmer*, No. 82-1630 (July 3, 1984), slip op. 9, quoting *Wolff* v. *McDonnell*, 418 U.S. at 566. See also *Hewitt* v. *Helms*, 459 U.S. 460, 467 (1983). "Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial, criminal, and often violent conduct." *Hudson* v. *Palmer*, slip op. 8. "Prison life, and relations between the inmates themselves and between the inmates and prison officials or staff, contain the ever-present potential for violent confrontation and conflagration." *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119, 132 (1977). Thus, "central to all other corrections goals is the institutional consideration of internal security." *Pell* v. *Procunier*, 417 U.S. 817, 823 (1974). However, maintaining order, safety, and discipline in a prison is a formidable task, as events in recent years have dramatically illustrated.

Maintaining prison security demands a system of inmate discipline that is firm, fair, and unhesitating. At times it is imperative that inmates who commit infractions threatening security be removed from the general prison population. Infractions must also be punished for deterrent purposes. If this system breaks down because members of disciplinary tribunals are fearful of retaliatory suits for damages, the safety of the prisoners, prison officials, and others

may be jeopardized. Preservation of this system is a matter of high public importance that fully justifies absolute immunity for disciplinary tribunal members.

c. Finally, there can be no serious doubt that the effective functioning of prison disciplinary tribunals would be very seriously impaired if members were not protected by absolute immunity. IDC members would face a severe threat of harassing and intimidating litigation—a threat fully comparable to that confronted by judges, grand jurors, and prosecutors and, in our judgment, far more severe than that faced by most ALJs.

IDC adjudications occur in a setting in which tensions and the potential for retaliation frequently run high. As the Court has noted (*Wolff* v. *McDonnell*, 418 U.S. at 562), prison disciplinary proceedings take place against a background in which prison officials and inmates "co-exist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment, and despair are commonplace." "The reality is that disciplinary hearings and the imposition of disagreeable sanctions necessarily involve confrontations between inmates and authority * * *. Retaliation is much more than a theoretical possibility." *Ibid.* In some instances, the retaliatory urge is so great that physical force is used. If prisoners are empowered to strike out against IDC members by suing them personally for damages based upon alleged procedural defects in the disciplinary proceedings, "[s]uch suits could be expected with some frequency" (*Imbler* v. *Pachtman*, 424 U.S. at 425). The urge to turn the tables on prison officials—to make *them* the accused and to disrupt *their* personal lives—will frequently prove irresistible.[15]

[15] This concern is especially great in the case of federal prison disciplinary tribunals, because prisoners are generally barred by sovereign immunity from suing the United States or the Bureau of Prisons for damages. Thus, IDC members will bear the full brunt of the prisoners' resentment.



The threat of retaliatory and harassing litigation is particularly severe because prisoners as a group are prodigious and indiscriminate litigators.[16] The factors that normally deter the filing of frivolous lawsuits—such as court costs, assessment of attorney's fees, counterclaims for malicious prosecution, unfamiliarity with court procedures, and the time needed to conduct litigation—are notably absent in the case of many prisoners.

[16] For example, in the year ending June 30, 1984, prisoner suits (591 cases) comprised 35% of the Seventh Circuit's civil docket (1649 cases) and 26% of its entire docket (2254 cases). Administrative Office, U.S. Courts, *Director's Annual Report* Table 8-7 (1984).

There is no merit to respondents' argument (Br. in Opp. 18-19) that prison officials adjudicating disciplinary cases have been deprived of absolute immunity against suits for damages under Seventh Circuit precedent since *Chapman* v. *Kleindienst*, 507 F.2d 1246 (7th Cir. 1974), and that this liability has not resulted in many prisoner suits. *Chapman* merely held (*id.* at 1249 n.4) that such an official could be sued under *Barr* v. *Matteo*, 360 U.S. 564 (1959), if he was not acting within the outer perimeter of his official duties. Petitioners in this case would be absolutely immune under this standard. Not until the present case and *Redding* v. *Fairman*, 717 F.2d 1105, 1117 (7th Cir. 1983), cert. denied, No. 83-980 (Feb. 21, 1984) (state prison), did the Seventh Circuit reject absolute immunity for officials who adjudicate disciplinary cases in adult correctional facilities. But see *Chavis* v. *Rowe*, 643 F.2d 1281, 1288 (7th Cir.), cert. denied, 454 U.S. 907 (1981) (stating that member of state prison disciplinary committee has qualified immunity; no discussion of absolute immunity); *Hayes* v. *Thompson*, 637 F.2d 483, 489-490 (7th Cir. 1980) (same); *Mary & Crystal* v. *Ramsden*, 635 F.2d 590 (7th Cir. 1980) (only qualified immunity for members of disciplinary committee at juvenile facility).

Furthermore, the "flexible and variable" nature of the requirements imposed by the Due Process Clause (see *Hewitt* v. *Helms*, 459 U.S. at 472) afford prisoners ample opportunity to assert due process claims arising from most if not all disciplinary proceedings. It is clear that prison disciplinary proceedings need not be conducted like trials. *Ibid.*; *Wolff* v. *McDonnell*, 418 U.S. at 560. But the flexible nature of due process requirements will permit prisoners to argue that, under the circumstances of their case, the disciplinary committee departed too far from trial procedures in this or that particular. Thus, every IDC ruling adverse to the prisoner—*e.g.*, every piece of evidence admitted or excluded, every continuance granted or denied, every unfavorable finding, and every punishment meted out—will be a potential count in a *Bivens* suit seeking extravagant sums in compensatory and punitive damages. See *Imbler* v. *Pachtman*, 424 U.S. at 425. More than 30,000 IDC hearings are held each year, and in almost half of these cases the sanction of disciplinary segregation is imposed. Consequently, the potential for retaliatory and harassing lawsuits is vast.

If absolute immunity is denied, the predictable result will be most unfortunate, not only for IDC members, but also for the prison system and the courts. Exposing IDC members to a civil suit for damages "would seriously cripple" (*Spalding* v. *Vilas*, 161 U.S. 483, 498 (1896)) the viability of the prison dispute resolution system by threatening the freedom and independence of these decisionmakers. Members of prison disciplinary tribunals are persons of modest means. In many cases, an adverse judgment of the size typically sought in a *Bivens* suit would result in the loss of their homes and savings. If IDC members



are suable for damages for their every procedural misstep, only the most stalwart or foolhardy prison officials would willingly serve on IDCs. *Harlow*, 457 U.S. at 814; *Economou*, 438 U.S. at 509-510; *Ward* v. *Johnson*, 690 F.2d at 1108; *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1948), cert. denied, 339 U.S. 949 (1950); see *Taylor* v. *Kavanagh*, 640 F.2d 450 (2d Cir. 1981). And those who do serve would inevitably be influenced in their rulings by the threat of retaliatory lawsuits.

The Fourth Circuit has aptly summarized the need to extend absolute immunity to prison officials who adjudicate inmate disciplinary cases (*Ward* v. *Johnson*, 690 F.2d 1098, 1108 (1982) (en banc) (footnote omitted)):[17]

> The proclivities of prison inmates to engage in litigation are prodigious. It has been estimated that between 30 and 40 percent of our appeals in this Circuit concern proceedings by prison inmates. That burden on the courts will be im-

[17] In *Ward*, the court held that absolute immunity barred suit against the chairman of the state prison Adjustment Committee, a body similar to a federal prison IDC, for alleged constitutional defects in the Committee's proceedings. Accord, *Segarra* v. *McDade*, 706 F.2d 1301, 1305 (4th Cir. 1983); contra, *King* v. *Wells*, No. 83-1705 (6th Cir. Apr. 12, 1985), slip op. 9; *Jihaad* v. *O'Brien*, 645 F.2d 556 (6th Cir. 1981); cf. *King* v. *Higgins*, 702 F.2d 18, 20 (1st Cir. 1983), cert. denied, 464 U.S. 965 (1983) (court agrees defendant has qualified immunity; no claim or discussion of absolute immunity). The weight of district court authority also supports absolute immunity for prison disciplinary officials. *Riley* v. *Smith*, 570 F. Supp. 522, 526 (E.D. Mich. 1983); *Anderson* v. *Luther*, 521 F. Supp. 91, 97 (N.D. Ill. 1981); *Breedlove* v. *Cripe*, 511 F. Supp. 467 (N.D. Tex. 1981); *Fitchette* v. *Collins*, 402 F. Supp. 147 (D. Md. 1975); contra, *Hilliard* v. *Scully*, 537 F. Supp. 1084, 1088-1089 (S.D.N.Y. 1982); cf. *Cavey* v. *Levine*, 435 F. Supp. 475, 483 (D. Md. 1977).

measurably increased by allowing suits arising out of disciplinary hearings which have been as carefully structured as this one has been in order to provide every reasonable "safeguard" of an inmate's right to a fair and impartial hearing within the prison context * * *.

Moreover, lawsuits, whether meritorious or not, are always burdensome, harassing, and time-consuming. It is difficult enough to secure qualified prison employees. That task will be made more difficult, particularly in securing officials to serve on Adjustment Committees, if, however, fair they try to be, such officials are subjected to the hazards of repeated litigation by disappointed defendants in disciplinary hearings. Ordinarily, prison officials are not generously rewarded for their services and the threat of an award against them personally would be a hazard many would feel themselves not justified in risking. The prison system itself will also likely be seriously hampered by a denial to the members of the Adjustment Committee [of] absolute immunity, since prison employees will unquestionably be resistant to accepting appointment as members of an Adjustment Committee if acceptance entails the serious hazard of being sued personally for their actions strictly as members of the Committee

2. The principal argument advanced by respondents and by those judges who have concluded that IDC members should not have absolute immunity is that IDC adjudications lack the procedural formality needed to qualify as quasi-judicial proceedings. Br. in Opp. 13-17; Pet. App. 11a-13a (Cudahy, J., concurring); *Ward* v. *Johnson*, 690 F.2d 1098, 1115 (4th Cir. 1982) (Winter, C.J., dissenting). This argument misapprehends the relevant legal question and inaccurately characterizes IDC proceedings.



To be sure, in *Butz* v. *Economou*, *supra*, this Court supported its conclusion that ALJs perform a role "'functionally comparable' to that of a judge" by noting (438 U.S. at 513) that "federal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process." But *Economou* did not suggest that only those adjudicatory proceedings with trial-type procedures and safeguards can qualify for absolute immunity. The most that can be said of *Economou* is that it does not *require* absolute immunity for IDC members, not that it forecloses such immunity.

This Court's immunity and due process decisions refute the proposition that procedural formality is a prerequisite for absolute judicial or quasi-judicial immunity. If absolute immunity depended on the presence of trial-type procedures and safeguards, judges conducting many summary and ex parte proceedings, such as the issuance of search warrants or temporary restraining orders, would not be clothed with absolute immunity. But see *Stump* v. *Sparkman*, 435 U.S. at 362-363 & n.12; pages 15-16, *supra*. Nor would absolute immunity shield grand jury proceedings or prosecutorial decisionmaking. But see *Imbler* v. *Pachtman*, 424 U.S. at 420-424; pages 17, 20, *supra*. What is critical under this Court's immunity decisions is not the formality of the procedures but the nature of the function performed by the official claiming absolute immunity and the need for such immunity to permit the proper discharge of that function. IDC proceedings fully meet these requirements.

Due process principles implicitly point to the same conclusion by recognizing that practicalities may justify adjudications lacking trial-type procedures and

safeguards. See, *e.g.*, *Hewitt* v. *Helms*, 459 U.S. at 475; *Gerstein* v. *Pugh*, 420 U.S. 103 (1975). Yet a judicial decision—such as the authorization of a search warrant, the setting of bail, or the issuance of a temporary restraining order—is no less judicial because the situation demands expedition and procedural informality. This Court has held that the practicalities of prison administration justify procedural informality in the conduct of prison disciplinary proceedings. *Wolff* v. *McDonnell*, 418 U.S. at 556-572. Introducing more elaborate trial-type procedures—in essence, recasting prison disciplinary tribunals in the mold of formal administrative tribunals—would be inimical to the needs of prison discipline and security. As the Court implicitly recognized in *Wolff*, such formalization would "very likely raise the level of confrontation between staff and inmate" (418 U.S. at 563), undermine rehabilitative goals (*ibid.*), cause undue delay and administrative problems (*id.* at 570-571), and compromise "personal security in the institution" (*id.* at 563). In view of these factors, it would make no sense for the Court to hold that IDC procedures, which fully comply with and indeed exceed what *Wolff* requires, are not sufficiently "judicial" to qualify for absolute immunity. Not only would such a holding be doctrinally inconsistent, but it also would create great pressure, quite possibly irresistible, for increased formalization of IDC procedures. Thus *Wolff*, as a practical matter, would be undone.

In any event, contrary to respondents' contention, IDC proceedings contain ample safeguards to ensure that constitutional errors are avoided or corrected.[18]

[18] BOP regulations governing inmate discipline have been amplified since 1975, but even at that time the regulations "were fairly extensive." Pet. App. 24a (Celebrezze, J., dissenting) (footnote omitted). Compare BOP Policy Statement (J.A. 25-49) with 28 C.F.R. 541.10-541.23 (partially reprinted at Pet. App. 37a-60a). Respondents' disciplinary hearing occurred less than one year after the decision in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), and only six months after promulgation of the first regulations governing the procedures at IDC hearings.



To promote impartial adjudications, no staff member who reports or investigates an incident may sit on an IDC considering the charge. BOP Policy Statement ¶ 9(a) (J.A. 35-36); see 28 C.F.R. 541.16(b) (Pet. App. 42a). In addition, the chairman and at least one other member of the committee must have the rank of department head or higher, thus ensuring the stature and independence of the decisionmakers. *Ibid.*; see also note 4, *supra*.[19]

An inmate accused of misconduct is entitled to prior notice of all charges at least 24 hours before his hearing. Charges that are not serious may be resolved informally, while serious charges must be referred to the IDC. 28 C.F.R. 541.15; Pet. App. 38a-42a. After referral of the case to the IDC, the inmate may select a correctional staff member as his advocate, and the IDC may grant a continuance to allow the advocate to prepare. BOP Policy Statement ¶ 9(c)(1) and (2) (J.A. 36-37); see 28 C.F.R. 541.17(a) and (b) (Pet. App. 43a-44a). At the hearing, the inmate has the right to make a state-

[19] Since June 1, 1983, only BOP personnel who have passed a written examination on IDC procedures are certified to serve on an IDC. Maintenance of the certification is a critical element in the job performance standards of eligible officials, and failure to pass the written examination after two opportunities is a ground for an unsatisfactory performance appraisal.

ment, to present documentary evidence, and, under certain circumstances, to call witnesses. BOP Policy Statement ¶ 9(c)(3) (J.A. 37); see 28 C.F.R. 541.17(c) (Pet. App. 44a-45a). If the IDC refuses to call a witness requested by the inmate, the reasons must be reflected in the record. *Ibid.* The inmate is generally entitled to be present at all phases of the hearing except the deliberations. BOP Policy Statement ¶ 9(c)(5) (J.A. 38); see 28 C.F.R. 541.17(d) (Pet. App. 45a-46a). The IDC is required to keep a detailed record of its actions sufficient to show, inter alia, the Committee's findings and decision, the specific evidence on which it relied, and an explanation for the sanctions imposed. BOP Policy Statement ¶ 9(c)(4) (J.A. 37); see 28 C.F.R. 541.17(g) (Pet. App. 47a).

As an additional safeguard, inmates may seek administrative review at three levels—from the warden, the regional director, and the assistant director (general counsel) of the Bureau of Prisons. BOP Policy Statement ¶ 10 (J.A. 40-41); see 28 C.F.R. 541.19 (Pet. App. 48a-49a) and 28 C.F.R. Pt. 542. This case clearly illustrates that an inmate's right to administrative review is not an empty one. The warden ordered respondents' release from administrative segregation and restoration of their forfeited good time, and the Regional Director ordered respondents' disciplinary records expunged. As Judge Celebrezze noted (Pet. App. 26a), "the efficiency of the review is demonstrated by the decision to modify, and, ultimately, to reverse the IDC's decision in this case." Finally, a prisoner dissatisfied with the disposition of his administrative appeals may seek review in federal court under 28 U.S.C. 2241. See, *e.g.*, *Prieser* v. *Rodriguez*, 411 U.S. 475, 487-488 (1973) (state habeas corpus); *Johnson* v. *Avery*, 393 U.S. 483 (1969) (state habeas corpus); *Dawson* v. *Smith*, 719 F.2d 896 (7th Cir. 1983); *Jackson* v. *Carlson*, 707 F.2d 943 (7th Cir.), cert. denied, 464 U.S. 861 (1983); *Kyle* v. *Hanberry*, 677 F.2d 1386 (11th Cir. 1982). These procedures provide a fully effective remedy for any procedural deficiencies in IDC cases and obviate any need for personal damages actions to protect inmates' procedural rights.



3. A rule recognizing absolute immunity for IDC members is not inconsistent with *Wood* v. *Strickland*, 420 U.S. 308 (1975), which held that school board members sued under 42 U.S.C 1983 for improperly expelling or suspending students were entitled to qualified, but not absolute, immunity.[20] In *Wood*, no claim was made that the school board members were performing a quasi-judicial function; nor was the claim of absolute immunity restricted to activities

[20] The court below summarily rejected absolute immunity on the strength of its own precedents holding, in reliance on *Wood*, that state correctional officials who serve on disciplinary committees enjoy only qualified immunity. Pet. App. 1a-2a; see page 8, *supra*. However, none of these prior decisions discussed the question of absolute immunity in any detail. The initial Seventh Circuit decision (and the only one containing any analysis of the absolute immunity issue) was *Mary & Crystal* v. *Ramsden*, 635 F.2d at 600, which merely stated that members of the disciplinary committee at a state juvenile facility performed a function "more similar to that of the school board members in *Wood v. Strickland*, 420 U.S. 308 * * * (1975), than to that of a judge." See also Pet. App. 10a-11a (Cudahy, J., concurring; relying on *Wood*); *Ward* v. *Johnson*, 690 F.2d at 1115-1116 (Winter, C.J., dissenting; relying on *Wood*). The only other court of appeals decisions denying absolute immunity to prison disciplinary officials, see note 17, *supra*, are similarly devoid of supporting analysis.

that might be so characterized. Instead, the school board members argued broadly that they were absolutely immune for the performance of all "discretionary duties." Pet. Br. 43. Moreover, in rejecting this blanket claim (cf. *Harlow* v. *Fitzgerald*, 457 U.S. at 808-809, 811-812), the Court acted against a common-law background altogether dissimilar from that present here. The *Wood* Court found (420 U.S. at 318 & n.9) that school officials had frequently been sued under state law and that state courts had generally extended immunity for "all good-faith, nonmalicious actions" taken by school officials "to fulfill their official duties." The Court concluded (*id.* at 320) that such qualified immunity should be available under Section 1983 as well but that "at the same time, the judgment implicit in this common-law development is that absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner."

In our judgment, there can be no meaningful analogy between *Wood* and cases involving prison disciplinary proceedings. "The prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration." *Ingraham* v. *Wright*, 430 U.S. 651, 669 (1977); see also Pet. App. 21a n.5 (Celebrezze, J., dissenting). Schoolchildren and their parents do not have the same motives, means, or proclivity to institute and maintain harassing lawsuits as do prisoners. In addition, the Court in *Wood* was faced with the judgment of state courts, after many years of experience, that qualified immunity was sufficient to protect school officials from suits for damages. The common law experience provides no comparable



assurances regarding prisoner suits,[21] and we believe, as previously noted (pages 24-28, *supra*), that IDC proceedings have an enormous potential for generating harassing and retaliatory litigation.[22]

4. Finally, there is no force to the argument that IDC members do not require absolute immunity because they "are accorded adequate protection against harassment by the enlarged safeguards of qualified

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[21] Until relatively recently, many obstacles blocked prisoner suits against prison officials. Federal prison officials were (and are) absolutely immune against state tort claims (*Barr* v. *Matteo*, 360 U.S. 564 (1959); *Spalding* v. *Vilas*, 161 U.S. 483 (1896); see W. Prosser, *Law of Torts* § 132, at 988 (4th ed. 1971)) and thus were effectively immune from damages suits of any kind prior to *Bivens*. State officials often had similar protection under statutes barring suits by prisoners. See Note, *Prisoners' Remedies for Mistreatment*, 59 Yale L.J. 800, 801 & n.4 (1950). Prison officials were also held immune under the doctrine of administrative discretion (*id.* at 801 & n.5) and the "conviction held with virtual unanimity by the courts that it [was] beyond their power to review the internal management of the prison system." Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 Yale L.J. 506, 508 (1963) (footnotes omitted).

[22] Furthermore, if relevant, the procedures followed by the school officials in *Wood* share none of the formality of IDC proceedings. Compare 420 U.S. at 312-313 with pages 30-33, *supra*. The same appears to have been true of the disciplinary proceeding in the juvenile facility in *Mary & Crystal* v. *Ramsden*, *supra*, the Seventh Circuit case on which the decision below ultimately rests (see note 20, *supra*). For example, the juveniles in *Mary & Crystal* were not given written notice of the charges against them or informed about the conduct of the hearing or the procedure for appealing an adverse decision. Nor were the juveniles allowed to have an advocate or to present witnesses on their behalf. 635 F.2d at 594 n.1.

immunity as announced in *Harlow*." Pet. App. 15a (Cudahy, J., concurring). See also *Ward* v. *Johnson*, 690 F.2d at 1116-1117 (Winter, C.J., dissenting); Br. in Opp. 19-22. Qualified immunity, even as recast in *Harlow*, would provide insufficient protection for IDC members. IDC members would still bear the burden and expense of demonstrating that they did not violate any clearly established constitutional rights. Where material facts are disputed, they would still have to undergo potentially burdensome and expensive discovery and a trial. And they would bear the risk that a judge or jury, with the benefit of hindsight and time for careful study years after the event, might conclude that clearly established rights were violated.

The short answer to the argument that qualified immunity is sufficient for IDC members is that the same could be said for judges, administrative law judges, grand jurors, and prosecutors, all of whom face the same threats and should therefore enjoy the same immunity. Unless protected by absolute immunity, judges, administrative law judges, grand jurors, and prosecutors would be swamped and demoralized by suits brought by disgruntled litigants, even if it appeared likely that all or most of those suits would ultimately be dismissed on qualified immunity grounds. The psychological burden, as well as the real economic effects, of defending against such suits would be considerable. The same is true for IDC members, who need and deserve the same protection if the existing carefully balanced and unquestionably beneficial prison disciplinary system is to continue in its present form.



## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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## STATEMENT OF FACTS*

Plaintiffs David Saxner and Alfred Cain were prisoners at the Federal Penitiary in Terre Haute, Indiana in January of 1975. Saxner was serving a 4 year sentence for a marijuana related offense, while Cain was serving a 5 year sentence. [Tr. pp.4, 98] Both were within 18 months of their maximum release dates, both were due to appear before the Parole Board within the next few months, and both had excellent prison conduct records. [Pl 10, 15]

On January 6, 1975, a black prisoner, William Lowe, died in the Terre Haute Prison hospital under highly suspicious circumstances. He was the first of four black prisoners to die in the hospital in the next seven month period. [Tr. p.5] Lowe's death triggered extreme concern among Terre Haute prisoners, and many participated in a peaceful two day work stoppage on January 7th and 8th to protest his death. [Tr. p.7, Pl. 1] Neither Plaintiff participated in this work stoppage. [Tr. pp.7-8, 118] Rather Saxner, a white prisoner and respected "jailhouse lawyer," and Cain, a black prisoner and the librarian for the African and New World Cultural Society, concentrated their efforts on gathering information concerning Lowe's death and the conditions at the prison hospital, and on informing interested members of the press, Congress, prison officials, and Saxner's attorney, ACLU lawyer Arpiar Saunders, of the results of the investigation. [Tr.

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*The facts of this case, as summarized in the opinion of the Seventh Circuit and by the Defendants in their brief, fall far short of capturing the reality of the disciplinary hearings afforded to the Plaintiffs pursuant to the Federal Bureau of Prisons Policy Statement on discipline in effect in 1975. Plaintiffs have therefore submitted this detailed Statement of Facts in order that this Court may be fully informed of the proof at trial.

pp.9-10, 118-119] This investigation included the interview of several prisoners who had recently been confined in the prison hospital. [Tr. pp.14-16, Pl. 3] As a result of Plaintiffs' work, a judge, a senator, and several congressmen were contacted, and they wrote letters to the Warden. A national letter writing campaign was launched, accounts were written in several publications, the Assistant Surgeon General came to Terre Haute to investigate, the prison doctor resigned, and ultimately a lawsuit arising from the last of the four hospital deaths was filed. [Tr. pp.9-12, 92-3, 166-7, 179-80, 183] *See Green v. Carlson,* 581 F.2d 669 (7th Cir. 1978) aff'd *Carlson v. Green,* 446 U.S. 14 (1980). During the six weeks following Lowe's death, a "considerable amount of momentum" had been built with Congress, lawyers, and others by the Plaintiffs' investigation. [Tr. pp.18-19]

On February 14, 1975, Plaintiff Saxner was scheduled to appear on local television as part of a cultural program. [Pl. 21] Instead he was called to the Captain's office and told that he was to be transferred to the Prison Farm—a separate enclave where he would be unable to continue his investigation. When Saxner protested the transfer, he was charged with encouraging others to refuse to work. [Tr. pp.20-23] He was taken to an isolated and unused part of the hospital which was temporarily being used as a segregation unit and locked in a cell. [Tr. p.23] An hour later Cain was placed in an adjoining cell, for an identical charge. [Tr. p.24]

Both Plaintiffs remained locked in segregation at the hospital 24 hours a day for the next seven days. [Tr. p. 23] On February 21st, they were brought before the institutional Disciplinary Committee (IDC) for a "hearing"



on the charge. The Committee was made up of three long-time Bureau of Prisons employees who had worked their way up through the ranks from prison guard. Defendant Cleavinger, the Assistant Warden of Programs, was the Chairman of the Committee. He was in charge of the correctional force, education, and classification and parole within the prison, and had been a correctional officer for twenty-one years. [Tr. pp.346-371] Defendants Lockett and Marcadis, two other long-time correctional employees, were the other members of the IDC. Lockett was in charge of classification and parole while Marcadis was an "operational lieutenant", acting Captain, and in charge of the Segregation Unit. [Tr. p.231]

The Warden sought as IDC members those officers who had "dealt with inmates on a more daily basis" There was no training, instruction or education given to these IDC members, other than that they were to follow the policy statement on discipline. [Tr. pp.229-230, 272-3]

The Bureau of Prisons Policy Statement on Discipline which was operative on and before February 14, 1975, [Pl. 7] did not provide for the presence or cross examination of adverse witnesses, representation by a lawyer, a taped or otherwise verbatim record of the proceedings, a standard of proof, clearly defined standard of punishment, or for non-agency or judicial review. Although the policy statement permitted a prisoner to call witnesses unless security or repetition prevented it, that was not the practice at Terre Haute. By the Defendants' own admission, live testimony was "not the common way" and guards never appeared before the Committee to present evidence. [Tr. pp.387, 401]

Saxner was brought before the Committee on the charge of "Encouraging Others to Refuse to Work." The "investigation" of the incident stated that Saxner:

> . . . stated that this charge was totally absurd and that he was categorically innocent. He stated that he was charged with this because he refused to go to the Farm Camp. He said he had nothing else to say. His attitude was fair during the interview,

and listed as "other facts" only that "considering the various items picked up from this man's cell, I would say there is little doubt about his activities." [Pl. 5, p.2]

These items, obtained in a search of Saxner's cell, were attached to the report. They consisted of a four page "press release" entitled "Prisoners at Terre Haute Seek an Investigation" which Saxner had sent to fifty newspapers [Pl. 1, Tr. pp.11-12]; a four page document which detailed interviews with prisoners on the subject of their medical treatment at the hospital [Pl. 3]; and a letter from Saxner to ACLU lawyer Arpiar Saunders which enclosed the other two documents and which discussed medical conditions, possible lawsuits on behalf of the Lowe family and segregated prisoners, communications with the press, and the obtaining of local lawyers. [Pl. 4] The remainder of the investigator's report consisted of his conclusion "guilty as charged. A definite ringleader in the activity charged." [Pl. 1]

Neither the investigating nor charging officer was brought before the committee, nor was any more detail provided from them in writing. The "information" allegedly "received" by the charging officer—that Saxner was encouraging the work stoppage—was not detailed or verified in any way. Saxner professed his innocence, offered to take a lie detector test at his own expense, requested that he be permitted to call inmates to confirm that he was not encouraging a work stoppage, and to confront his accusers. [Tr. pp.34-35] All of these requests were denied.* The committee presented the aforementioned documents as its "evidence" against Saxner, and when it said that was all the evidence it had, both Saxner and his correctional employee representative told the Committee that the charge was "preposterous," and that it had presented no evidence of encouraging a work stoppage. The staff representative said that the committee would have to "reword the charges or present more evidence because . . . the evidence didn't correspond to the charge." [Tr. pp.31-32]



The committee then caucused and, *sua sponte*, orally charged the Plaintiff with two new "offenses": "unauthorized use of the mails" for mailing the press release through the "Prisoners Mail Box" (P.M.B)** and possession of "contraband" for possessing the seized documents. [Tr. p.32] Saxner was given no written notice whatsoever of the new charges, and no time to prepare a defense. [Tr. p.35] Even the Warden admitted that these actions directly violated existing BOP policy with regard to notice and committee composition.***

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*The requests for witnesses were denied because they were allegedly repetitive of affidavits presented by Saxner. [Tr. pp. 357-358]. The Committee's attitude about the credibility of prisoner testimony is demonstrated by its statement that it would be "very foolish" to take other prisoners' evidence because they would not admit that Saxner had committed an infraction. (Def. Ex. 10, p. 2, J.A. 58)

**The Policy Statement on the Prisoners Mail Box which was operative at that time expressly provided for its use for mail to the media. [Pl. 2, p.11]

***The Policy Statement provided that the prisoner be given notice of the offense in writing within 24 hours of its commission, and at least 24 hours before the hearing [Pl. 7,

(Continued on following page)

The non-verbatim "record" of the hearing which was never tendered to the Plaintiff, shows that the Committee interrogated Saxner at length with a primary focus on the contents of the seized documents and on the Plaintiffs' investigation, the contents and veracity of which the committee members repeatedly and defensively challenged. [See Def. 10, esp. pp.3-5]

Saxner protested to the Defendant Committee members that their actions violated BOP policy and the Constitution [Tr. p.33], but they nonetheless found him guilty of all three charges. [Tr. p.36] Their written "findings" did little more than reiterate the proffered charges,* and the testimony of the IDC Defendants at trial revealed that their reasons for finding Saxner guilty were confused, contradictory and did not support a guilty finding on any of the charges. This testimony further showed that the Defendants improperly considered the contents and dissemination of the documents and Plaintiffs' investigation to be evidence in support of the work stoppage charge, and lent substantial support to the conclusion that it was for these constitutionally protected activities that both Saxner and Cain were in reality charged and convicted.**

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pp. 9,10]; and further that committee members could not have also investigated, witnessed or reported the incident. [Ibid., p.10]

*Under "Reason for Action Taken" the Committee wrote: "Saxner was found Guilty of Encouraging Others to Refuse to Work from the information received from staff and the written and investigative reports. He was also found Guilty of Unauthorized Use of Mail (701) (sending manuscripts out) and Possession of Contraband (article from Prisoners Union, Leavenworth Penitentiary). It is felt the Education Supervisor, or his representative, should talk with Saxner regarding manuscripts and the regulations." (Def. 10)

**Defendant Cleavinger said that the documents [Pl. 1,3] "advocated an investigation" of Lowe's death, that they "talk(ed) against the institution and want(ed) to say that we

(Continued on following page)



Plaintiff Cain was then brought before the same IDC on an identical "encouraging" charge. He too denied the charge, offered to take a lie detector test, and requested the right to confront his accusers. These requests were denied [Tr. p.102] During the hearing a second charge—possession of contraband—was brought without prior notice. [Tr. pp.106-107] The "contraband" was a 1973 letter to the Bureau of Prisons from "Inmates of Terre Haute Prison" which set forth the case for a prison labor union at Terre Haute. [Pl. 14] This document, seized from Cain's cell, was also available from the Cultural Society library. [Tr. pp.114-116] According to the hearing "record," Cain was interrogated as to whether he supported, was "talking up," or forming a labor union. Cain denied that he was, but professed that a union would be beneficial. Defendant Lockett then told him to shut up. [Tr. p.104, Pl. 15, p.2] Cain was shown Saxner's letter to attorney Saunders, and Marcadis asked him if he had anything "in his possession that was encouraging dissension or un-

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are doing wrong things which is wrong" [Tr. p.356], thereby making them "contraband" and their possession a violation of the "encouraging" provision as well. [Tr. pp.356-7, 373-4] He redefined the press release to be a "manuscript" because it named staff and inmates for publication and therefore claimed that sending it through the PMB, where it would not be censored, was "unauthorized use of the mails." [Tr. pp.376-80] No policy statement or other such document defined a manuscript in this way, forbade the naming of staff or other prisoners in either a communication to the press or a manuscript, or made the mailing of a manuscript, either by PMB or regular mail, a disciplinary offense [see and compare Pl. 2, para. 3; Def. 2, particularly para. 41, 5(a) (1), (2) and (15); Pl. 22, para. A, and para.5, p.2]. Marcadis said that the documents supported the work stoppage charge because they were "inflammatory" and referred to the Lowe death as "murder." [Tr. pp. 396-397] Similarly, Benson testified that Saxner had no reason or right to investigate as he was not a "medical doctor." [Tr. p.268]

rest, or an attitude to encourage people to get up in arms in violation of the rules." [Tr. pp.102-103, Pl. 13, pp.2-3] Cain denied this as well, stated that he had spoken against the January work stoppage, and cited the proximity of his parole hearing and jeopardizing his college classes as further reasons why he would not have committed the offenses. [Pl 13, pp.1,3] The "record" of the hearing further stated that "Cain identified Saxner as the writer of the letter to Arpiar Saunders." [Pl. 4, p.3]

Cain, like Saxner, was found guilty of all charges. Both men were sentenced to an indefinite stay in segregation and had approximately three months of good time "forfeited."

Cain was held in L Unit until March 21, 1975, making his entire period of segregation on these charges 35 days. He was confined in his cell for more than 23½ hours a day, had no access to the prison yard or exercise facilities, and was permitted to go outside for only one-half to one hour per week, rather than the six hours per day which was permitted in general population. He could shower and shave only twice a week, could not attend his college classes, or use the law library or educational facilities, and had to eat in his cell rather than in the cafeteria. [Tr. 52, 108-9, 235-6] His cell window was broken, and he was deprived of much of his personal property; many books, papers and his radio was never returned to him. (See Pl. 23) He could not go to his job in the paint shop, and therefore could not earn good time which would shorten his maximum outdate. [Tr. 110-11] He could not participate as librarian of the New World Cultural Society. [Tr. 111-12]

While in segregation he was "highly frustrated" and "nervous," because he "was locked up for something he didn't do" for an indeterminate period of time, and be-



cause he could not make parole unless the case were overturned. [Tr. 123] In fact, Cain did not make parole in June, and instead was released on his maximum outdate in December, a date which he was unable to shorten by earning good time while he was segregated.

Saxner was sent to G Unit and spent the first week in the Unit's first cell. The cell had no window or functioning light bulb, and he spent the first five days in near total darkness until his complaints were heard and a new light bulb supplied [Tr. 41-2] The conditions in the cell were "repulsive." Vomit and feces were caked on the walls, floor and toilet seat. He was not permitted to leave his cell, where it was extremely hot due in part to poor ventilation. [Tr. 41-2, 46, 78] He had no pillows, blankets or sheets and no cleaning materials for several days, although he repeatedly requested them. The unit was "infamous" for beatings, and he witnessed a beating during his stay there. [Tr. 37-40, 55] Conditions in G Unit were even more restrictive than in L, as it was used to house especially dangerous prisoners. [Tr. 37-40, 77] Saxner brought these repulsive conditions to the specific attention of Defendant Cleavinger by a letter dated February 24th [Pl. 8, Tr. 43-44], and in person to Defendant Marcadis who visited G Unit a "number of times" during the week Saxner was held there. [Tr. 45] After seven days, he was transferred to L Unit for an additional two weeks, where he was subjected to similar conditions as Plaintiff Cain. He too spent a total of thirty-five days in segregation.

Saxner likewise suffered fear and anxiety while in segregation. He feared physical harm, particularly while in G Unit. [Tr. 55] He lost weight, and harbored a constant fear that he would not make parole because it was Bureau of Prisons' policy to deny parole if a prisoner had

lost good time in the six months prior to the Board appearance. [Tr. 54, 55] He had a deservedly high expectation of making parole before the loss of good time, and dreaded the loss of fifteen months of freedom during his entire stay in segregation. [Tr. 53, 58, Pl. 10]

It was Bureau of Prisons policy for the IDC committee to "review" segregation cases after ten days. [Tr. 366] The Defendants, if they followed Bureau of Prisons policy, held this review and continued Plaintiffs in segregation. The Plaintiffs appealed to Warden Benson, and, on March 21st their appeal was partially granted at his recommendation. They were returned to general population and their good time was restored, but their request for expungement was denied. (Pl. 10) They appealed to the Regional Office of the Bureau of Prisons, and after the Regional Office so recommended, the Plaintiffs were granted expungement on April 11th. [Tr. 63] Warden Benson claimed that the action was taken because of pressure from Saxner's family, and because of due process violations [Tr. 273, 275] rather than due to their innocence; the Bureau Policy Statement on Discipline, however, mandates expungement only where the "inmate has been determined innocent of the charges." [Pl. 7, para. 9(d) (1), at p.12]

Saxner appeared before the Parole Board on April 11, 1975, was granted parole, and was released an April 25th. Cain went to the Board in June, but was continued to his maximum date in December, when he was finally released. Both have remained on the street since that time, both have families, and both have been gainfully employed since their release. [Tr. 3-4, 97]



## SUMMARY OF ARGUMENT

This court has established the general rule that executive government officials are entitled to only qualified immunity from damage liability for constitutional deprivations. In *Butz v. Economou*, 438 U.S. 478 (1978) this court carved out a rare exception to this rule, holding that certain executive officials — specifically administrative law judges operating under the Administrative Procedure Act — were "functionally comparable" to judges and were entitled to "quasi-judicial" immunity for acts committed in their adjudicatory capacity. *Butz* made clear, however, that performance of an adjudicatory function was a necessary, but not a sufficient, prerequisite for extension of "quasi-judicial" immunity. To be eligible for such immunity, the official must share other characteristics of judges — they must adjudicate in a process in which their independence guarantees the impartiality of their decisions, and in which there exists sufficient procedural safeguards to insure the reliability of their rulings.

*Butz* found that administrative law judges operated in such an adjudicatory process. In sharp contrast, Prison Institutional Disciplinary Committee members do not possess the independence necessary to the extension of "quasi-judicial" immunity. They are not professional hearing examiners, but are ordinary prison officials who are temporarily diverted from their usual duties. They are employees of the Bureau of Prisons; they are the direct subordinates of the Warden to whom review of their decisions go; they are the co-workers and peers of fellow guards who bring charges against the prisoners upon whom they sit in judgment and whose credibility they must often weigh against that of the prisoners.

Nor does the prison disciplinary process contain any of the substantial procedural safeguards contained in the Administrative Procedure Act which this Court in *Butz* found necessary to application of "quasi-judicial" immunity. Prisoners are afforded neither a lawyer nor an independent non-staff advocate. There is no right to compel witnesses nor to cross-examine adverse witnesses under oath; there is no right to discovery, rebuttal, findings of fact or conclusions of law. Nor is there a cognizable burden of proof, no verbatim transcripts of the proceedings are made, and the charges of misconduct are often vague, overbroad, and lend themselves to selective enforcement and arbitrary misapplication.

Rather than administrative law judges who operate under the APA, prison IDC members are more akin to the school board members of *Wood v. Strickland,* 420 US 308 (1975) who, among their other duties, sometimes must function as adjudicators in the school disciplinary process, and who are entitled to only qualified immunity.

It is clear that the proper balance to be struck between the right of prisoners to a damage remedy and the legitimate concerns of prison IDC members is to afford the latter only a qualified immunity from damage liability for constitutional deprivations. This will allow prisoners to be compensated for serious constitutional deprivations and will provide a necessary deterrent to future abuses.

Moreover, officials who possess qualified immunity are gaining an increasing arsenal of tools which allow them to promptly dispose of any potential "harassment" lawsuits with a minimum of cost and inconvenience. Under this Court's modification of the qualified immunity standard in *Harlow v. Fitzgerald,* 457 US 800 (1982), a defendant is entitled to such immunity if it can be shown that the right alleged to be violated was not clearly established, thus allowing for prompt disposition without the necessity of pretrial discovery proceedings. And if the claim of qualified immunity is denied, the official is entitled to a pretrial appeal of that ruling. Moreover, under *Harlow,* the motivation or malice of the official is no longer relevant.



These legal weapons are more than sufficient to protect defendants from any perceived threat of harassment. In the context of prison disciplinary cases, all the IDC officials need to do is follow the simple constitutional requirements of *Wolff v. McDonnell,* 418 US 539 (1974), and they have no reason to fear harassment or liability.

If the government is truly concerned with the effects of potential financial exposure of its prison officials, it can take steps which are less drastic than affording such officials absolute immunity from liability. Among other things, it can indemnify them against money judgments or it can amend the Federal Tort Claims Act to allow claims directly against the government for constitutional deprivations which occur at IDC hearings. Or, the government can hire independent adjudicators, such as administrative law judges, to preside at procedurally sufficient prison IDC hearings who then may, unlike prison guards, be entitled to "quasi-judicial" immunity.

Lastly, even if IDC members were afforded absolute immunity for their adjudicatory functions, it would not benefit them in the instant case. Here, one of the major due process violations found by the jury—the bringing of additional charges without notice in the midst of the hearing by the IDC members themselves—is clearly not an adjudicatory function.

**The Defendants, As Members Of A Prison Institutional Disciplinary Committee, Are Entitled To Only A Qualified Immunity From Damage Liability For The Deprivation Of A Prisoner's Constitutional Rights.**

In a series of decisions announced over the years, this Court has definitively established the general rule that executive government officials are entitled to only a qualified immunity from damage liability for constitutional deprivations. *See Pierson v. Ray,* 386 U.S. 547 (1967) (police officers); *Scheuer v. Rhodes,* 416 U.S. 232 (1974) (state governor and his aides); *Wood v. Strickland,* 420 U.S. 308 (1975) (school board members); *O'Connor v. Donaldson,* 422 U.S. 563 (1975) (superintendent of state hospital); *Procunier v. Navarette,* 434 U.S. 555 (1978) (prison officials); *Butz v. Economou,* 438 U.S. 478 (1978) (federal cabinet member); *Harlow v. Fitzgerald,* 457 U.S. 800 (1982) (presidential aides). This general rule is, however, subject to those exceptional situations where it is demonstrated that absolute immunity is "essential for the conduct of the public business," *Butz,* 438 U.S. 478, 507 (1978).

The nature of the absolute immunity which has been extended to executive officials falls into two distinct categories—"executive" immunity and "quasi-judicial" immunity. Thus, in *Nixon v. Fitzgerald,* 457 U.S. 731 (1982), the President of the United States was found to be entitled to absolute executive immunity as a functionally mandated incident of his unique office. Thus far, the President is the only executive government official who has been found to be entitled to such absolute executive immunity.

The second type of absolute immunity which has been extended to executive officials—"quasi-judicial" immunity—is itself comprised of two types. One such type applies



to executive officials, such as prosecutors, who are so intimately connected to the judicial process that they are entitled to an absolute immunity when they are performing a "quasi-judicial" function. *See Imbler v. Pachtman,* 424 U.S. 409 (1976). The second type arose out of this Court's recognition in *Butz v. Economou,* 438 U.S. 478 (1978) that certain executive officials—specifically administrative law judges subject to the Administrative Procedure Act (APA)—were "functionally comparable" to judges and were entitled to "quasi-judicial" immunity for acts committed in their adjudicatory capacity. The Court reached this conclusion, however, only after finding 1) that the adjudicatory process at issue guaranteed the independence of the administrative law judges and contained sufficient procedural safeguards to reduce the need for private damage actions as a means of controlling unconstitutional conduct; 2) that the responsibilities of the hearing officers were functionally comparable to those of a judge and the specific acts complained of were adjudicatory in nature; and 3) that the performance of the officials' adjudicatory duties made him or her a likely target for harassing or intimidating litigation. *See Butz,* 438 U.S. at 512-513.

The defendant administrative law judges in *Butz* met each of these requirements. The Defendant Institutional Disciplinary Committee (IDC) members here do not. Nevertheless, these Defendants contend that simply because they perform an "adjudicatory" function when they determine whether prisoners have violated institutional rules, they are entitled to be cloaked with the absolute "quasi-judicial" immunity of *Butz.* This simplistic argument is without support in the decisions of this Court and would result in an unwarranted and unjustfiable extension of the extraordinary doctrine of absolute immunity.

Performance of an adjudicatory function is a necessary, but not a sufficient, prerequisite for application of "quasi-judicial" immunity. *Butz* made clear that to be eligible for such immunity, the official must share other characteristics of judges in our judicial system. That is, they must adjudicate in a process in which their independence guarantees the impartiality of their decisions, and in which there exist sufficient procedural safeguards to insure the reliability of their rulings. *Butz*, 438 U.S. at 508-514.

## I. Prison IDC Members Do Not Possess The Independence And Impartiality Of Judges Which Are Necessary To Extension Of "Quasi-Judicial" Absolute Immunity.

The main purpose underlying the doctrine of absolute judicial immunity is to preserve "that independence without which no judiciary can either be respectable or useful." *Bradley v. Fisher*, 13 Wall 335, 354, 20 L.Ed. 646 (1872). This immunity "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

In extending absolute "quasi-judicial" immunity to administrative law judges, this Court in *Butz* emphasized that their independence and impartiality contributed heavily to the concluson that they were "functionally comparable to judges." The Court stated:

> There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is 'functionally comparable' to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence,



> regulate the course of the hearing, and make or recommend decisions . . . More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency.

*Butz* at 513.

In fact, the *Butz* court commented at great length on the legislative history of these provisions of the APA which protect this independence:

> Prior to the Administrative Procedure Act, there was considerable concern that persons hearing administrative cases at the trial level could not exercise independent judgment because they were required to perform prosecutorial and investigative functions as well as their judicial work, see *e.g., Wong Yang Sung v. McGrath*, 339 U.S. 33, 36-41 (1950), and because they were often subordinate to executive officials within the agency, see *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 131 (1953). Since the securing of fair and competent hearing personnel was viewed as "the heart of formal administrative adjudication," Final Report of the Attorney General's Committee on Administrative Procedure 46 (1941), the Administrative Procedure Act contains a number of provisions designed to guarantee the independence of hearing examiners. They may not perform duties inconsistent with their duties as hearing examiners. 5 U.S.C. § 3105 (1976 ed.). When conducting a hearing under § 5 of the APA, 5 U.S.C. § 554 (1976 ed.), a hearing examiner is not responsible to, or subject to the supervision or direction of, employees or agents engaged in the performance of investigate or prosecution functions for the agency. 5 U.S.C. § 554(d)(2) (1976 ed.). Nor may a hearing examiner consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate. § 554(d)(1). Hearing examiners must be assigned to cases in rotation so far as is prac-

ticable. § 3105. They may be removed only for good cause established and determined by the Civil Service Commission after a hearing on the record. § 7521. Their pay is also controlled by the Civil Service Commission.

*Butz* at 513-514.

Recognizing the importance of independent adjudicators to application of "quasi-judicial" immunity, the Defendants here make repeated references to the necessity of preserving the "freedom and independence" of the IDC decision makers. (Defendants' Brief at 26, 31). However, to describe prison IDC members as "independent" is to ignore reality.

IDC members "are not professional hearing officers, but ordinary prison officials temporarily diverted from their usual duties." *Ward v. Johnson,* 690 F.2d 1098, 1115 (4th Cir. 1982) (Chief Judge Winter, dissenting). They are employees of the Bureau of Prisons and the direct subordinates of the Warden, to whom review of their decisions go; they are the co-workers and confederates of fellow guards who bring charges against the prisoners upon whom they sit in judgment and whose credibility they must often weigh against that of the prisoners. Given the subordinate relationship of the IDC "adjudicators" to the institution and the peer relationship and loyalty they share with individual guards who bring charges against prisoners, it is apparent that IDC members are under great pressure to resolve disciplinary disputes in favor of the institution and fellow guards.* Despite the

*"(T)he reality that disciplinary boards, composed of correctional officials, may be overly inclined to accept the word of prison guards and refuse without reason to hear witnesses cannot be ignored."

*Ponte v. Real,* 471 U.S. —, 105 S. Ct. 2192,2204 (1985) (Marshall, J., dissenting). The attitude of IDC members about the

(Continued on following page)



Defendants' attempts to do so, IDC members cannot in good faith be described as "independent".

Moreover, apart from these pressures which preclude independence, the realities of day-to-day prison life make clear that IDC members can in no sense be considered "impartial" adjudicators. Prison officials who sometimes serve on IDCs, like other prison officials, strongly identify with the institution they serve in disputes which arise between that institution and its prisoners. This partiality is underscored by the testimony of defendant IDC member Cleavinger at the trial below, whose stated motivation for disciplining the plaintiffs was that they had "talk(ed) against the institution and want(ed) to say that we are doing wrong things which is wrong." [Tr. 356]

These pressures and predilections which bias IDC members in favor of the institution and fellow guards result in an equally great bias against prisoners who face discipline. As the defendants themselves recognize in their brief, this Court noted in *Wolff v. McDonnell,* 418 U.S. 539, 562 (1974), that prison disciplinary proceedings take place against a background in which prison officials and prisoners "co-exist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment, and despair are commonplace." The dramatically unequal relationship between keeper and kept permeates the entire prison environment and is aptly demonstrated here by the fact that defendant Marcadis, as an Operational Lieutenant in charge of the Segregation Unit, directly supervised the Plaintiffs' custody and con-

(Continued from previous page)

credibility of prisoner testimony is demonstrated by Defendant Lockett's statement that it would have been "very foolish" to take other prisoners' evidence because they would not admit that Saxner had committed any infraction. (Def. Ex. 10, p.2, J.A. 58).

trol while they were in segregation, while Cleavinger and Lockett were in charge of their classification and parole.

Given this environment, it cannot be argued that a prison official who temporarily serves on an IDC is comparable to an independent, impartial administrative law judge. As Judge Cudahy succinctly stated in his concurring opinion below:

> The committee members are prison guards and supervisory employees who are in daily contact with the prisoners upon whom they sit in judgment. The committee members are supervisors and fellow employees of the guards who bring the charges and are in an unequal adversarial relationship with the prisoners. They are the keepers judging the kept rather than impartial adjudicators trained in law and presumably free of bias and prejudice.

*Saxner v. Benson*, 727 F.2d 669, 675 (7th Cir. 1984), (Judge Cudahy, concurring).*

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In support of their quest for absolute immunity, the Defendants argue that the most relevant officials with whom to compare IDC members are parole board members. Relying upon *Sellars v. Procunier*, 641 F.2d 1295 (9th Cir. 1981), *cert denied*, 454 U.S. 1102 (1981) and *United States ex rel. Powell v. Irving*, 684 F.2d 494 (7th Cir. 1982), the Defendants point out that several courts have granted parole board members such immunity.**

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*Moreover, the normally unequal and adversarial quality of the inmate-keeper relationship was further exacerbated here by the Plaintiffs' outspoken public criticism of the Defendants and their institution, whom they were investigating on serious charges of official misconduct. The evidence at trial strongly suggested that Plaintiffs were charged and punished by these Defendants in retaliation for pursuing these constitutionally protected activities. See Statement of Facts, (Supra) at p.6, Fn. **.

**This Court has not yet ruled on the issue of what, if any, immunities are available to parole board members. *See Martinez v. California*, 447 U.S. 277, 284 (1980).



Whatever the propriety of these decisions, they are easily distinguishable from this case, because there is a fundamental difference between parole board members and IDC members. This Court recognized in *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972), that a parole board is a "neutral and detached" hearing body. In *Sellars v. Procunier*, while holding that members of the California Adult Authority were absolutely immune from damage liability, the Ninth Circuit stressed that its members, like judges, functioned in an "independent dispute resolving system," 641 F.2d at 1299-1300, and noted that in deciding to grant, deny or revoke parole, the members "act in a quasi-judicial capacity *as an arm of the sentencing judge.*" 641 F.2d at 1302, note 15. (emphasis supplied)

In *United States ex rel. Powell v. Irving*, 684 F.2d 494 (7th Cir. 1982), the Seventh Circuit, relying on *Sellars*, held that members of the Illinois Prisoner Review Board were entitled to absolute immunity. In so holding, the Court emphasized Illinois statutes which guarantee the independence and professionalism of the board.*

Parole board members are impartial professionals who serve in no other role.** Their background, training

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*Illinois statutes provide that the Prisoner Review Board shall be "independent of the Department of Corrections," consisting of 10 persons appointed by the Governor by and with the advice and consent of the Senate, who have at least five years actual experience in the fields of penology, corrections, law enforcement, sociology, law, education, social work, medicine, psychology, [illegible] other behavioral sciences. Ill. Rev. Stat., Ch.38, § 1003-3-1. [illegible] statute creating the California Adult Authority contained similar provisions. See Cal. Pen. Code, §§ 5075, 5076.

**In addition, parole board hearings offer substantial procedural safeguards which are not present at IDC hearings, such as the right to counsel, to testimony under oath, to a transcript of the proceedings and the right to confront and cross-examine adverse witnesses. *Rules Governing Parole*, State of Illinois Prisoner Review Board. See argument below at Part II.

and complete independence from the prison administration place them in sharp contrast to IDC members who are "ordinary prison officials temporarily diverted from their usual duties." *Ward v. Johnson*, 690 F.2d 1098, 1115 (4th Cir. 1982) (Chief Judge Winters, dissenting).*

A more apposite comparison exists between IDC members and school board members who, among their other duties, sometimes must function as "adjudicators in the school disciplinary process." *Wood v. Strickland*, 420 U.S. 308, 319 (1975). Like IDC members, school board members "must judge whether there have been violations of school regulations and, if so, the appropriate sanctions for the violations." *Wood*, 420 U.S. at 319.

Despite performance of an "adjudicative" function, this Court in *Wood*, after an extensive analysis, found that school board members would be adequately protected by a qualified immunity, concluding that "absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations." *Wood*, 420 U.S. at 320. This conclusion is equally applicable here.

*Despite the Defendants' contention at page 10 of their brief, IDC's are not composed of "specially trained" prison officials. Typically, the IDC in this case was made up of three-long-time Bureau of Prison employees who had worked their way up through the ranks from prison guards, and were selected because the Warden sought officers "who had dealt with inmates on a more daily basis." They received absolutely no training, instruction or education other than that they were told to follow the policy statement on discipline. (Tr. pp.229-230, 272, 273). The Defendants' observation at page 31 of their brief that since June 1, 1983, only BOP personnel who have passed a written examination may serve on an IDC is commendable, but irrelevant to this case since the IDC hearing took place in 1975.



The Defendants seeks to distinguish *Wood* on two grounds. They first argue that in *Wood*, no claim was made that the school board members were performing a quasi-judicial function. (Defendants' brief at 33) This argument is belied by the explicit language of the Court's opinion in *Wood*, as quoted above.

Secondly, the Defendants argue that "there can be no meaningful analogy between *Wood* and cases involving prison disciplinary proceedings" (Defendants' brief at 34). Quoting *Ingraham v. Wright*, 430 U.S. 651, 669 (1977), the Defendants note that "the prisoner and the school child stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration."

If the Defendants' intent in quoting this language is to leave the impression that prisoners require fewer constitutional protections than school children, they are grossly in error. In *Ingraham*, this Court drew the contrast relied upon by the Defendants to demonstrate the opposite proposition—that the schoolchild, unlike the prisoner, "has little need for the protection of the Eighth Amendment," noting that the "openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses for which the Eighth Amendment protects the prisoner." *Ingraham*, 430 U.S. 651, 670 (1977).

In sharp contrast to public schools, prisons are closed institutions which operate for the most part out of the public eye. Prisoners are members of a disfavored class who, more so than most others, must look to the courts for protection. The potential for abuse by prison officials, including IDC members, requires that the courts be espe-

cially reluctant to limit the remedies available to prisoners for deprivation of their constitutional rights.*

In any event, the proper analogy is not, as Defendants suggest, between schoolchildren and prisoners. Rather, it is between the members of a school board and the members of a prison IDC. As Judge Cudahy recognized in his concurrence below in *Sarner v. Benson*, 727 F.2d 669, 674 (7th Cir. 1984),

> [T]he prison disciplinary proceedings at issue here are certainly much more akin to the school board meeting in *Wood* than to a hearing conducted by an administrative law judge under the Administrative Procedure Act.

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Finally, a fundamental fact which the Defendants ignore is that there are pervasive influences on judges which distinguish them from IDC members, despite the fact that both may perform an adjudicatory function. Judges exist and operate in the millieu of the American judicial process. The traditions inherent in the judicial role within this process place restraints upon judges that cannot be casually dismissed. *See* K. Llewellyn, The

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*For some egregious examples of the abuse of the prison disciplinary process, see, e.g.: *Smith v. Rowe*, 761 F. 2d 360 (7th Cir. 1985) (22 months in segregation for being a jailhouse lawyer); *Sostre v. Rockefeller*, 312 F.Supp. 863 (S.D. N.Y. 1970) *aff'd. in pertinent part* sub nom *Sostre v. McGinnis*, 442 F.2d 178, 189-90 (2d Cir. 1971) (one year of segregation as punishment for being a jailhouse lawyer and black militant); *King v. Blankenship*, 636 F.2d 70 (4th Cir. 1980) (excessive force used by IDC chairman at hearing); *U.S. ex. rel. Larkins v. Oswald*, 510 F.2d 583 (2d Cir. 1975) (segregation for possession of a political newspaper); *Sostre v. Preiser*, 519 F.2d 763 (2nd Cir. 1975) (17 months segregation for wearing a ¼" beard); *Chapman v. Kleindienst*, 507 F.2d 1246 (7th Cir. 1974) and *Chapman v. Pickett*, 586 F.2d 22 (7th Cir. 1978) (8 months of segregation for refusing to handle pork for religious reasons). *See also Adams v. Carlson*, 488 F.2d 619 (7th Cir. 1973).



Common Law Tradition, 46-50 (1960). As one noted commentary has observed:

> A final restraint—perhaps the most important—consists simply of the character of the vast majority of judges and the history, traditions, and procedural climate of the judiciary and the judicial system. With relatively minor exceptions, judges are selected from among a professional bar which has been imbued, both in legal training and in practice, with a sense of the judicial responsibility for maintaining dignity and fairness. Ritualistic displays of respect toward judges, manifested not only in court but also in informal gatherings, reinforce this sense of responsibility. In addition, the very formality and decorum of judicial proceedings tend to encourage fair and impartial judicial action and to discourage malicious or irresponsible statements.
>
> It seems reasonable to assume that these restraints and protections serve to minimize the possibility of injury at the hands of an irresponsible judge. This being so, the need for the additional remedy and restraint provided by a rule permitting personal liability tends to decrease.

Handler and Klein, The Defense of Privilege in Defamation Suits Against Government Executive Officials, 74 Harv. L. Rev. 44, 54-55 (1960).

As the Senate Report on the legislation which created administrative law judges observed, that legislation was designed "(t)o insure the independence and impartiality of the administrative process" and to "preclude the possibility of agency pressure or influence" on the administrative law judges. "In essence," the Senate Committee concluded, "individuals appointed as ALJ's hold a position with tenure very similar to that provided for Federal judges under the Constitution." Senate Report No. 95-697, 1978 U.S. Code Cong. and Admin. News 496, 497 (95th Cong. 2d Session).

In sharp contrast, IDC members exist and operate in the prison environment. They have continuing security responsibilities, and are unaffected by any restraints within the prison system which would minimize the need for a damage remedy on behalf of prisoners. As Judge Cudahy stated below:

> The activities and procedures of these prison officers are so dissimilar in form and substance from those of judges granted absolute immunity that reliance on an all-encompassing similarity of quasi-judicial function will not wash.

*Saxner v. Benson*, 727 F.2d 669, 674 (7th Cir. 1984) (Judge Cudahy concurring).

## II. The Lack Of Procedural Safeguards Contained In The Federal Bureau Of Prison's Policy Statement Which Governed Institutional Disciplinary Proceedings At The Time Of Plaintiffs' Hearings Precludes Application Of "Quasi-Judicial" Absolute Immunity.

In *Wolff v. McDonnell*, 418 U.S. 539 (1974), this Court recognized that prison disciplinary proceedings were an informal, non-adversarial means of imposing sanctions upon prisoners who had been found to violate institutional regulations, having its "utility as a means to further correctional goals." 418 U.S. at 569-570. As a result, the *Wolff* court held that prisoners who appeared at such proceedings were not entitled to those fundamental rights which attached to formal adjudicatory proceedings such as the right to counsel and the right to confront and cross-examine witnesses. Rather, prisoners were to receive only "those minimum procedures appropriate under the circumstances and required by the Due Process Clause" to protect them against arbitrary abrogation of state-created rights. *Wolff*, 418 U.S. at 557.



Prisoners charged with serious misconduct which could result in the loss of good-time credits were entitled only to receive advance written notice of the charges, the opportunity to respond to the charges to the extent that such response did not jeopardize institutional safety or correctional goals, and a written statement as to the evidence relied upon and the reasons for any disciplinary action taken. *Wolff*, 418 U.S. at 563-567.*

Subsequently, the Federal Bureau of Prisons adopted a Policy Statement on Discipline, based on *Wolff*, which outlined the procedures to be followed at prison IDC's. (J.A. pp. 25-49) The disciplinary hearings which have been held pursuant to the BOP's policy statement have been described by the courts as ranging from "informal", *Jihaad v. O'Brien*, 645 F.2d 556, 561 (6th Cir. 1981), to inescapably "inquisitorial," *McCollum v. Miller*, 695 F.2d 1044, 1048 (7th Cir. 1982).**

Faced with the absence of most procedural safeguards necessary to insure the reliability of the findings of federal prison IDC's, the Defendants are compelled to argue to this Court that the presence of such safeguards in proceedings under the Administrative Procedure Act were not essential to the holding in *Butz*. (Defendants' brief at 17, 28-30) Despite this desperate attempt to re-

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*The non-judicial character of prison IDC proceedings has been reinforced by decisions of this Court subsequent to *Wolff*, holding that prison IDC's may rely upon evidence received subsequent to conclusion of the "hearing", *Baxter v. Palmigiano*, 425 U.S. 308, 322-323, n.5 (1976) and holding that the reasons for refusing to call witnesses requested by the prisoner need not be made part of the "record" at the IDC proceeding, *Ponte v. Real*, 471 U.S. —, 105 S.Ct. 2192 (1985).

**The inquisitorial nature of the proceedings here is demonstrated by the non-verbatim "records" of the plaintiffs' I.D.C. hearings which reflect a detailed interrogation of plaintiffs by the Defendants concerning their constitutionally protected activities in an obvious attempt to develop evidence to support the pretextual charges. (see J.A. pp. 56-67)

write *Butz*, it is clear that the presence of substantial procedural safeguards under the APA was one of the linchpins of this Court's decision to extend absolute immunity to administrative law judges.

In its analysis in *Butz*, this Court noted that absolute judicial immunity from damage liability was supported by the fact that "the safeguards built into the judicial process tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct." *Butz* at 512. Observing that federal administrative law required agency adjudication to "contain many of the same safeguards as are available in the judicial process," the *Butz* court concluded:

> *In light of these safeguards*, we think that the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women. We therefore hold that *persons subject to these restraints* and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts. *Butz*, 438 U.S. at 513, 514 (emphasis added).

Despite the Defendants' argument to the contrary, it is clear that under *Butz*, absolute immunity attaches only to those executive officials who are engaged in an adjudicatory process which contains substantial safeguards, such as the impartiality of the decision-making process; the reliability of the information developed; the importance of precedent in resolving controversies; the adversary nature of the proceedings; and the availability of judicial review. *Butz*, 438 U.S. at 512-513.

The *Butz* court found that the Administrative Procedure Act contained sufficient safeguards since its protections included notice, representation by a lawyer, a



verbatim transcript of the proceedings, subpoena power, presentation of oral and documentary evidence, cross-examination of adverse witnesses under oath (limited only by considerations of relevancy and materiality), rebuttal evidence, and prehearing discovery. 5 U.S.C. §§ 554-557. The APA also provides for imposition of a burden of proof, and findings of fact and conclusions of law presented by the parties and ruled on by the hearing officer. Also, the hearing officer may not be involved in prosecutorial or investigative duties or be supervised by an employer interested in the case, and is subject to recusal for personal bias. 5 U.S.C. §§ 554-557, 701-702.

Comparison of the APA with the disciplinary policy of the Federal Bureau of Prisons in effect at the time of the hearings in this case clearly establishes that the prison disciplinary process falls woefully short of the requirements of *Butz*. It provided precious few of the procedural safeguards contained in the APA. Prisoners, typically uneducated and unschooled in law or procedure, were afforded neither a lawyer nor an independent non-staff representative. There was no right to compel witnesses or to cross-examine adverse witnesses under oath*: no right to discovery, rebuttal, findings of fact or conclusions of law. Nor was there a cognizable burden of proof,** no verbatim transcript of the hearings was made,*** and many of the charges of misconduct as listed

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*In fact, the general practice at Terre Haute Penitentiary in 1975 was not to permit any live testimony except from the charged prisoner, and guards *never* appeared before the committee to testify. [Tr. 387,401]

**Neither *Wolff* nor the Bureau of Prisons policy statement on discipline in effect at the time of the hearings in this case (J.A. 25-49) articulated any burden of proof whatsoever for prison IDC hearings.

***As is demonstrated here, the "record" is a subjective recitation by one of the I.D.C. members which reads like a police report not a transcript, and which the prisoner is not even allowed to see, let alone supplement or correct.

in the Policy Statement were so overbroad, vague, and undefined, as to themselves offend due process and lend themselves to selective enforcement and blatant misapplication*. As Judge Cudahy recognized in his concurring opinion below:

> The disciplinary policy of the Bureau of Prisons provides few of the safeguards of the APA. . . [T]he information presented to the committee is frequently hearsay, self-serving and unreliable. *See Bracy v. Herringa*, 466 F.2d 702 (7th Cir. 1972).** Of course, the decisions of the committee are not based on precedent since there is no recorded precedent. And review is restricted to agencies of the Bureau of Prisons. To suggest that the committee functions in any real respect like the administrative law judge in *Butz* is to depart from reality.

*Saxner v. Benson*, 727 F.2d 669, 675 (7th Cir. 1984) (Cudahy, J., concurring).

The Defendants substantially rely on *Ward v. Johnson*, 690 F.2d 1098 (4th Cir. 1982) which extended absolute immunity to members of Virginia State Prison IDC's. *Ward*, however, is easily distinguishable from the instant case. The Court in *Ward* considered the disciplinary procedures in effect in the Virginia state prison system. Under these procedures, a prisoner was entitled to be represented by a lawyer and afforded the right to confront and

*This is graphically shown here, where the charge "encouraging a work stoppage" is applied to investigating prison misconduct, possession of a document openly kept in a prison library and a letter to a lawyer become possession of contraband, and mailing of a press release becomes mailing of a "manuscript." *See also Smith v. Rowe*, 761 F.2d 360 (7th Cir. 1985), where defining a camera as contraband was found to be so vague as to violate due process.

**In *Bracy*, the Seventh Circuit held that reports by prison guards—which formed the entirety of the proof against prisoners in almost all hearings conducted under the BOP policy statement at Terre Haute—were inherently unreliable.



cross-examine his accusers. A tape recorded transcription of the proceedings was made and the prisoner had the right to present either oral testimony or written statements. The disciplinary committee was specifically barred from discovering the prisoner's prior prison record before guilt or innocence was determined. The Fourth Circuit relied heavily on these procedural guarantees, many of which were not required by *Wolff*, in determining that the hearing in *Ward* was "adversarial" within the meaning of *Butz*. Of course, the federal prison disciplinary policy at issue here provided for ***none*** of these safeguards.*

In support of their argument that procedural safeguards are not essential to extension of absolute immunity, the Defendants note that judges, in performing informal, ex-parte actions such as issuing search warrants and temporary restraining orders, still retain their immunity (Defendants' brief at 30). The examples cited, however, are not apposite to this case. The existence of substantial, well-established procedural safeguards in the American judicial system, which allows for absolute judicial immunity in the first instance, is sufficient to allow judges the latitude to engage in a number of limited, less formal proceedings, such as the issuance of search warrants or temporary restraining orders, both of which may be subsequently challenged by the affected parties at formal, plenary, adversarial hearings. In judicial proceedings, in-

*Although the procedures scrutinized in *Ward* were more complete than those afforded here, *Ward* was nonetheless wrongly decided given the *Butz* decision, as the procedures fell substantially short of those approved in *Butz* and, more importantly, the "independence" requirement was not met, as the Virginia IDC was comprised of prison officials rather than an independent hearing officer.

formality is the exception; in IDC hearings, it is the rule. Simply put, IDC members are not judges.*

Similarly, the Defendants argue that procedural safeguards are not essential to "quasi-judicial" absolute immunity since prosecutors and grand jurors, who do not operate under such safeguards, possess absolute immunity. (Defendants' brief at 16-17 20, 29). This argument, however, misses the essential point that these actors in the judicial process receive absolute immunity precisely and solely because of their "intimate association" with a process which *does* operate under substantial safeguards.** *See Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). As this Court stated in *Butz*, the "cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process . . ." *Butz*, 438 U.S. at 512. The Defendant IDC members here, in contrast, have no association, intimate or otherwise, with the judicial process and are not entitled to the "quasi-judicial" absolute immunity which has been extended to prosecutors, grand jurors, and witnesses.

Lastly, recognizing the lack of procedural safeguards at IDC proceedings, the Defendants argue that introducing more elaborate procedures "would be inimical to the needs of prison discipline and security." (Defendants' brief at 30). This observation, however, even if based in truth, provides no argument for extending absolute immunity to those who conduct such hearings. On the contrary, the purported necessity of informality at these hearings make availability of a damage remedy all the more essential to protect prisoners against the inevitable abuses which flow from such a lack of safeguards.



Some restraints on the behavior of government officials must exist to deter them from the abuse of constitutional rights. In the context of administrative proceedings, *Butz* held that an independent hearing examiner in combination with substantial procedural safeguards constituted an adequate restraint which served to minimize the need for a damage remedy. However, absent an independent adjudicator and sufficient safeguards, the only alternative restraint is a money damage remedy. See *Bivens v. Six Unknown Federal Narcotics Agents* 403 U.S. 388 (1971). The defendants here, however, invoking the shibboleth of prison security, argue that they must not be subject to *any* restraints. They want to maintain the extreme informality of their proceedings, and at the same time be absolutely immune from liability for their actions. In effect, they want to "have their cake and eat it too." Such a result, however, ignores the imperative of providing some form of deterrence to constitutional abuses.

## III. Allowing Prison Disciplinary Committee Members A Qualified Immunity Strikes The Proper Balance Between The Need To Protect Such Officials From Retaliatory Lawsuits And The Need To Protect The Fundamental Constitutional Right Of Prisoners.

It is clear that the proper balance to be struck between the right of prisoners to a damage remedy and the legitimate concerns of prison IDC members, is to afford

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*The appropriate analogy to the instant case would be that of a police officer who also served as a part-time magistrate, issuing search warrants upon application by his or her fellow officers, review of which went to the Chief of Police. Surely, such an official would not be entitled to absolute immunity. In fact, such a conflicting dual role is inimical to all notions of due process.

**Moreover, grand jurors work under the close supervision and direction of officials who are afforded absolute immunity—the Chief Judge and the prosecutor.

the latter only a qualified immunity from damage liability. Officials who seek qualified immunity have an increasing arsenal available to them to promptly dispose of any insubstantial "harassment" lawsuits with a minimum of cost and inconvenience.

For example, in *Butz,* this Court recognized that, "Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading" and stated:

> Unless the complaint states a compensable claim for relief under the Federal Constitution, it should not survive a motion to dismiss. Moreover, the Court recognized in Scheuer that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity. See 416 US, at 250, 40 L.Ed.2d 90, 94 S.Ct. 1683, 71 Ohio Ops. 2d 474. In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.

*Butz,* 438 U.S. at 507-508. Moreover, under this Court's recent modification of the qualified immunity standard, the defendant is entitled to immunity if it can be shown that the constitutional right allegedly violated was not clearly established or that exceptional circumstances existed which excused the officials' ignorance of a clearly established right, thus allowing for prompt disposition without the necessity of pretrial discovery proceedings. *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). If the defendant's qualified immunity claim is denied by the trial court, he or she is entitled to a pretrial appeal of that ruling. *Mitchell v. Forsyth,* — U.S. — (No. 84-335, 53 U.S.L.W. 4798,4802-4803, June 19, 1985).



These legal weapons available to defendants who seek qualified immunity are more than sufficient to protect them from any perceived threat of harassment. In the context of prison discipilinary cases, all these IDC officials have to do is follow the clear and simple constitutional requirements of *Wolff v. McDonnell,* 418 U.S. 539 (1974), and they have no reason to fear harassment or liability. In fact, subsequent to *Harlow,* the subjective intent of an IDC official—which is all too often a salient factor in incidents of abuse of prisoners' rights—is no longer sufficient to sustain a constitutional claim.

The Defendants, however, make several unconvincing claims as to why qualified immunity is insufficient to provide adequate protection to IDC members. They argue that if IDC members are afforded only qualifed immunity, and are thereby exposed to civil damage liability, the viability of the prison disciplinary system would be seriously crippled. They assert that prison officials would be chilled from serving on IDC's and that those who do serve would inevitably be influenced in their actions by the threat of retaliatory lawsuits. (Defendants' brief at 26-27). Similar arguments have been made by executive government officials over the years and have, for the most part, been properly rejected.* This Court has repeatedly held that allowance of only a qualified immunity placed no undue burden on executive government officials with greater responsibilities than prison IDC members. *See,*

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*Exposure to damage liability is insufficient to support a grant of absolute immunity to government officials. In *Pierson v. Ray,* 386 U.S. 547 (1967), this Court found that qualified immunity was sufficient to protect "that segment of the executive branch of a state government that is . . . most frequently exposed to situations which can give use to claims under § 1983—the local police officer." *Scheuer v. Rhodes,* 416 U.S. 232, 244-245 (1974).

*e.g., Scheuer v. Rhodes,* 416 U.S. 232 (1974) (state governor); *Butz v. Economou,* 438 U.S. 478 (1978) (federal cabinet member); *Harlow v. Fitzgerald,* 457 U.S. 800 (1982) (presidential aides); *Mitchell v. Forsyth* — U.S. — (No. 84-335, 53 U.S.L.W. 4798, June 19, 1985). (United States Attorney General in matters of national security).

As Justice Brennan cautioned in dissent in *Barr v. Matteo,* 360 U.S. 564 (1969), "the courts should be wary of any argument based on the fear that subjecting government officers to the nuisance of litigation and the uncertainties of its outcome may put an undue burden on the conduct of public business", as such an argument "is a gossamer web self-spun without a scintilla of support to which one can point." 360 U.S. at 588-589. Further, as one commentator has observed:

> Such arguments offer a wry blend of fairy tale and horror story. The picture of the unfettered public servant selflessly using his complete freedom for the good of society is heartwarming, but ignores human nature and the history of our liberties, which vividly demonstrate the apparently inevitable result of putting any unbridled powers in the hands of the executive. R.J. Gray, Private Wrongs of Public Servants, 47 Cal. L. Rev. 303, 339, (1959).

As this Court recognized in *Butz,*

> It is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment. 438 U.S. at 506-507.

The business of prison officials is to maintain order within their institutions. For this reason, such officials are notorious for their claims that every step taken to protect the rights of prisoners will inevitably lead to a breakdown in institutional discipline and security. In *Ex*



*Parte Hull,* 312 U.S. 546 (1941) prison officials argued that a regulation requiring that habeas corpus petitions first be submitted to prison authorities before being transmitted to the court was necessary to maintain prison discipline. In *Lee v. Washington,* 390 U.S. 333 (1968), prison officials argued that racial segregation of prisoners was necessary to maintain good order and discipline. In *Johnson v. Avery,* 393 U.S. 483 (1969), prison officials argued that a regulation which barred jailhouse lawyers from assisting fellow prisoners with writs was necessary to maintain discipline. All of these arguments were rejected by this Court. The same result should obtain here and this court should reject the argument that absolute immunity for IDC officials is necessary to maintain the viability of the prison disciplinary system.

The Defendants also argue that to deprive them of absolute immunity would require them to undergo the burden and expense of discovery and a trial. The defendants' claims concerning burdensome discovery proceedings and trials is grossly exaggerated. As established in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), unless the defendant violates the clearly established constitutional rights of a prisoner, there will be no discovery and no trial. Secondly, the reality of prisoner litigation is that the vast majority of cases are disposed of on the complaint alone, without requiring any response from the defendants at all. Of those prisoners whose complaints survive initial dismissal by the courts, few attempt discovery and fewer still actually get discovery. *See* Turner, When Prisoners Sue; A Study of Prisoner Section 1983 Suits in the Federal Courts, 92 Harv. L. Rev. 610, 611, 617, 624-625, 639 (1979).

The issue of expense to IDC members is simply a sham. As the Defendants and their counsel are well

aware, the government not only pays the litigation expenses of IDC Defendants, but also provides government lawyers to defend them, free of charge.*

* * * * *

Relying upon a laundry list of hyperbolic assertions, the Defendants argue that rejection of their claim to absolute immunity will result in a flood of litigation against prison IDC officials. They posit that the "flexible nature of due process requirements will permit prisoners to argue that, under the circumstances of their case, the disciplinary committee departed too far from trial procedures in this or that particular"; that "every IDC ruling adverse to the prisoner—*e.g.*, every piece of evidence admitted or excluded, every continuance granted or denied, every unfavorable finding, and every punishment meted out—will be a potential count in a *Bivens* suit seeking extravagant sums in compensatory and punitive damages," and, that, in many cases, "an adverse judgment of the size typically sought in a *Bivens* suit would result in the loss of their homes and savings." (Defendants' Brief at 26.)

None of these overstated claims is supportable in fact. The "flexible nature" of due process does not mean that prisoners will be unlimited in the claims they may bring. In fact, the opposite is true. The flexibility given to prison officials under the limited due process require-

*That explains how the Defendants have been able to appeal this $9000.00 case to the Seventh Circuit, sought rehearing in that court and pursued a writ of certiorari in this Court. Unlike private litigants who must retain counsel and bear the expense of litigation, government officials, like the Defendants here, are unfettered by the usual restraints of market forces, and can exhaustively appeal the most modest judgments against them, with no personal cost whatsoever.



ments in the prison context means that many prisoner claims will be determined not to be based upon "clearly established constitutional rights," and will be dismissable under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Moreover, many of the "potential *Bivens* counts" which the Defendants foresee—those based upon evidentiary rulings, the grant or denial of continuances, and the entry of findings—will be found, on motion to dismiss or summary judgment, not to involve the deprivation of a clearly established constitutional right *(Harlow)*, or, on the other hand, not to involve constitutional deprivations at all *(Wolff)*. What will be left to proceed to discovery and trial will be a small number of substantial constitutional claims, as in the instant case, which deserve to proceed to trial, and which justify a verdict of liability.

Further, it is regrettable that the Defendants show such little faith in the jury system, expressing the fear that juries will award the "extravagant sums" sought by prisoner plaintiffs in constitutional actions. Despite the Defendants' fears, juries are well able to render reasonable damage awards based upon the evidence before them, as this case graphically demonstrates. Juries simply are not in the habit of awarding "extravagant" damage awards, least of all to such disfavored litigants as prisoners.

Plaintiffs recognize that a monetary judgment against an individual defendant may prove burdensome. The answer, however, is not immediate resort to judicially mandated absolute immunity, thereby depriving prisoners of an essential remedy for constitutional deprivations. If the government is truly concerned with the financial exposure of its prison officials, it can move to indemnify them for any monetary judgments entered against them.

Alternatively, the government can amend the Federal Tort Claims Act to allow claims directly against the government for deprivations which occur at IDC hearings. *See Davis v. Passman,* 442 U.S. 228, 245-247 (1979); *Carlson v. Green,* 446 U.S. 14, 18-20 (1980). Or, the government can implement procedural safeguards similar to those approved in *Butz* and hire indendent hearing officers, such as administrative law judges, to preside at prison IDC hearings, who may, unlike prison guards, then meet the requirements for absolute "quasi-judicial" immunity. However, in the absence of such alternative solutions, this Court should not undertake the unwarranted and unjustifiable step of radically extending the doctrine of absolute immunity to protect prison officials who serve on IDCs from the consequences of their unconstitutional actions.

* * * * *

The Defendants also predict dire consequences to both the prison disciplinary system and the federal courts, as a purported influx of prisoner suits will result unless IDC members are afforded absolute immunity. The Defendants support this argument by citing a statistic which informs that 35% of the Seventh Circuit's civil docket is made up of "prisoner suits" (Defendants' Brief at 25).

In reality, the Defendants' statistic is highly misleading. When "prisoner suits" are separated into civil rights and habeas corpus categories, it is revealed that only 7.42% of the civil cases pending on June 30, 1983 in the District Courts of the Seventh Circuit were prisoner civil rights cases.* Moreover, this percentage must be further reduced in order to properly analyze the Defend-

*These statistics are taken from the Annual Report of the Director of the Administrative Office of the U.S. Courts (1983).



ants' contention, because the civil rights category includes injunctive as well as damages cases.

Most importantly, prisoner damages lawsuits against prison officials who are acting as IDC members comprise a very small percentage of suits filed against prison officials. The Seventh Circuit has expressly sanctioned damages suits against IDC members for at least 11 years. See *Chapman v. Kleindienst,* 507 F.2d 1246 (7th Cir. 1974). Yet, in that time, it has reviewed less than 15 prisoner damage claims against prison disciplinary board members. And, in the majority of those cases, the claims were substantial and the prisoner prevailed. This is hardly evidence of a barrage of harassing litigation, as the Defendants contend.

Any problematic increase in the caseload of federal courts must not be alleviated by closing the courthouse door to prisoners with legitimate grievances. As this Court recognized in *Davis v. Passman,* 442 U.S. 228, 248 (1979), in rejecting a similar argument that the courts would be deluged with a particular class of claims, the most fundamental answer to such concerns was that provided by Mr. Justice Harlan concurring in *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971):

> Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.

* * * * *

In *Marbury v. Madison,* 1 Cranch 137, 163, 2 L.Ed. 60 (1803), this Court recognized that "the very essence of

civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." And, it has also been recognized that: "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Biven v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 395 (1971). Nevertheless, the Defendants argue that the availability of administrative review and habeas corpus relief provide a fully effective remedy for prisoners, which obviates the need for personal damage actions. (Defendants' Brief at 32-33).

However, neither administrative review nor habeas corpus relief can make whole the prisoner who has already suffered substantial deprivations at the hands of a prison disciplinary committee, as did the Plaintiffs here. Prisoners upon whom discipline is imposed—such as being transfered to segregation—must typically seek administrative or habeas corpus relief *pro se,* or begin a letter-writing search for *pro-bono* counsel. Given the inherent difficulties in both corresponding and litigating from segregation, administrative or habeas corpus proceedings in most, if not all, such cases can only be instituted well after the prisoner has spent considerable time in segregation and has suffered substantial injury. Therefore, since the injury in most instances cannot be prevented by such non-damage remedies, adoption of absolute immunity would leave a prisoner without any remedy whatsoever.* It is this painful reality which the Defendants cavalierly ignore

*This would be the result here where Plaintiffs' *pro se* complaint was not even filed with the clerk until well after the Plaintiffs had been relegated to the particularly oppressive conditions of segregation, and where no proceedings were commenced until well after they had been released from segregation.



when they posit ultimate release from segregation as an adequate remedy.

In *Harlow v. Fitzgerald,* 457 U.S. 800, 814 (1982) this Court recognized,

> In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantes. *Butz v. Economou, supra,* at 506; see *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S., at 410 ('For people in Bivens' shoes, it is damages or nothing'). It is this recognition that has required the denial of absolute immunity to most public officers.

Moreover, the availability of a constitutional damage remedy serves two vital purposes. One is to compensate the plaintiff for his or her loss. The second and equally important purpose is to deter government officials from committing constitutional wrongs. *See Butz v. Economou,* 438 U.S. 478, 505 (1978). The availability of a damage remedy to prisoners for deprivation of their constitutional rights at IDC hearings is, clearly, the only effective means by which to deter such constitutional abuses from occurring.* Administrative, injunctive or habeas corpus relief given to a prisoner for deprivations of his or her rights at an IDC hearing is so attenuated from the IDC members personally as to have virtually no effect on the subsequent conduct of IDC members, because they are not named parties to those proceedings and they have no personal stake in the outcome. *See Carlson v. Green,* 446 U.S. 14 (1980).**

*It is "almost axiomatic" that the threat of damages has a deterrent effect, *Imbler v. Pachtman,* 424 U.S. 409, 442 (1976) (White, J., concurring in judgment), particularly so when the individual official faces personal financial liability.

**For a graphic example of the lack of deterrent value of an injunctive order, see *Adams v. Carlson,* 375 F.Supp. 1228 (S.D. Ill. 1974) (on remand), a case decided under the very

(Continued on following page)

## IV. Even If Absolute Immunity Is Extended To The Adjudicatory Acts Of Prison IDC Members, The Defendants Here Are Not Entitled To Such Immunity For The Non-Adjudicatory Act Of Proffering Additional Charges Against Plaintiffs, Without Notice, In The Midst Of The Hearing.

As the opinion in *Butz v. Economou* makes clear, executive officials who perform quasi-judicial functions may seek absolute immunity only for those acts which are adjudicatory in nature. Even assuming, for purpose of argument, that the Defendant IDC members here would qualify for such immunity, it would not benefit them in this case. The Defendants here, after being confronted with the abject weakness of the original charges against Plaintiffs, took it upon themselves to bring additional charges against them during the hearings *without prior notice*, and proceeded to find the Plaintiffs guilty on those

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(Continued from previous page)

policy statement on discipline at issue here. In *Adams*, after being directed to do so by the Seventh Circuit, 488 F.2d 619 (7th Cir. 1973), federal prison officials provided new disciplinary hearings to 49 prisoners who had been disciplined on 112 work stoppage charges. At the new hearings, only one or two of the 143 witnesses requested by the prisoners were called, no guards were called, and, not surprisingly, all 49 prisoners were reconvicted on all 112 charges. Confronted with these results, the District Court ordered the 49 prisoners released from segregation, some 18 months after they were originally locked up.

The lack of a deterrent value in internal administrative review proceedings is illustrated in the case at bar by the fact that the reviewing official, the Warden, never discussed this case with the IDC members after he admittedly became aware that they had violated the requirements of the BOP policy statement by proffering new charges without notice (Tr. pp. 276-7)



new charges.* Thus, the major due process violation found by the jury here—the bringing of additional charges without notice—is clearly not an adjudicatory function.**

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*In footnote 14 at page 22 of their brief, the Defendants assert that their activities which went beyond the bounds of quasi-judicial behavior—including the initiation of new charges by the IDC against the Plaintiffs at the hearing itself—"did not form the basis for the due process violations found in this case." What the Defendants conveniently omit from this assertion is that the IDC Defendants not only brought such additional charges against the Plaintiffs, they did so *without notice*—a combination of non-adjudicatory actions (bringing charges and giving notice of those charges), which even the Defendants admit at page 7 of their brief, formed the basis for the jury's verdict.

**The Defendants imply in footnote 8 of their brief that the proffering of these new charges without notice did not really matter, first because "Plaintiff Saxner admitted that he had committed the additional offenses and in any event [Saxner's] possession of the document was essentially incontrovertible." That Saxner admitted he committed these offenses is categorically false. It is even belied by the Defendant's own "record" of the hearing. Moreover, as Saxner stated, both at the hearing and at trial, he was *innocent* of the charges because what he mailed from the Prisoners Mailbox was a press release —which was permissible, rather than a manuscript which was not—and because the labor union document he possesed was openly kept in the prison library and was therefore not contraband. Tr. 11-19, 114-116, JA 58-63, 66-67, 93.

Secondly, the Defendants assert that "there is no indication" that the new charges proffered by the committee "resulted in the imposition of any additional punishment" (Defendants' Brief at p.8, f.n. 8). This is belied both by the evidence and by logic. First, the new charges were proffered only *after* it was shown by the Plaintiffs that the original charge was groundless. Therefore, the Committee must have thought that the additional charges were necessary to support the severe punishment meted out. Secondly, even if it is assumed that the new charges were only supplemental, it is obvious that someone who is "convicted" of three charges will be given a more severe punishment than one "convicted" on only one charge. Moreover, even if the Defendants' argument were accepted at face value, the issue is one of *damages* rather than *liability*; the Defendants remain guilty of a constitutional violation and the Plaintiffs have shown damage which flows from the violation—i.e. fear, mental pain, and suffering—which is unrelated to the punishment of segregation. *See Carey v. Piphus*, 435 U.S. 247 (1978).

This fact distinguishes the instant case from *Ward v. Johnson*, 690 F.2d 1098 (4th Cir. 1982) on which the Defendants rely, where the act complained of—the decision not to allow the testimony of certain witnesses as cumulative—was found by the Fourth Circuit to be an exercise of quasi-judicial discretion in making an evidentiary ruling. Indeed, the language of the Court in *Ward* makes clear that had it heard the *Saxner* case, it would in all likelihood have reached the same result as that reached by the Seventh Circuit. The Court in *Ward* stated:

> Our ruling illustrates the principle that every case in which immunity is claimed for members of the Adjustment Committee should be considered on its own facts, and with reference to the particular procedure under which the disciplinary hearing is held. To qualify for absolute immunity, the action involved must be of a judicial character. . . Absolute immunity will not attach to action taken by the members of a committee whose functions may be properly classified as administrative or investigative rather than adjudicatory.
>
> • • •
>
> We are not concluding that in connection with all prison disciplinary hearings the members of the Adjustment Committee enjoy absolute immunity. Perhaps this case would be different if the Plaintiff had been denied absolutely any notice of the charge against him, or if he had been denied the right to confront and cross-examine his accusers at the disciplinary hearing (though this right is circumscribed in *Wolff*), but that is not the claim of error here.

*Ward*, 690 F.2d at 1108-1109.

The facts of the IDC hearings involved in the instant case reveal that the Defendants not only sat in judgment of the Plaintiffs, but also participated in the investigation



of the charges against the Plaintiffs,* extensively interrogated them about constitutionally protected activities, and, when the pretextual nature of the original charges was exposed, caucused in the middle of the disciplinary hearing and, without notice, proffered additional, equally spurious charges against Plaintiffs. Without pause, they then found Plaintiffs guilty of those new charges. The Defendants clearly are not entitled to absolute immunity for this multifarious course of conduct.

The Defendants argue, however, that their activities in participating in the investigation, in questioning Plaintiffs at the hearings, and in initiating new charges against Plaintiffs during the course of the proceedings are not "incompatible with a quasi-judicial role." In support, the Defendants observe that grand juries, which are quasi-judicial bodies, conduct investigations, question witnesses, and make charging decisions. (Defendants' brief at 22-23, note 14).

This argument is spurious. While it is true that grand jurors perform all of the cited activities, they do not also sit as trial jurors in cases where they have conducted the investigation, questioned the witnesses, and proffered charges, as the Defendant IDC members did here.

The multiple roles played by the Defendant IDC members here have forced them to request immunities far beyond that afforded to any government officials: They seek the immunity of grand jurors for investigating and proffering charges; the immunity of prosecutors for questioning witnesses; and the immunity of judges for adjudi-

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*There was evidence that at least one of the Defendants, Cleavinger, participated in the investigation of the Plaintiffs, a non-judicial function which does not require absolute immunity. *Hampton v. Hanrahan*, 484 F.2d 602 (7th Cir. 1973).

cating at the hearings. The very fact that the Defendants must resort to such an argument reveals the enormous length to which the doctrine of absolute immunity must be stretched to embrace the conduct of prison officials such as these defendants.

## V. CONCLUSION

An important concern expressed by this Court is that grants of absolute immunity are appropriate only when the defendant official establishes that public policy so requires. *Butz v. Economou,* 438 U.S. 478, 506 (1978); *Harlow v. Fitzgerald,* 457 U.S. 800, 808 (1982). The Defendants here have made no showing that any public policy requires that they be granted absolute immunity. In fact, the result urged by the Defendants here would, as noted in *Butz,* result in a policy which is "contrary to the course of decision in this Court from the very early days of the Republic." *Butz,* 438 U.S. at 487.

To grant prison IDC members absolute immunity would be to deprive prisoners of their basic right to a damage remedy for violation of their constitutional rights. Such a result is ill considered and unnecessary. Prisoners, perhaps more than any other powerless group in our society, have historically looked to the courts for protection from, and redress for, constitutional abuses inflicted upon them by prison officials. To deny prisoners access to the courts, and to a damage remedy for the deprivation of their constitutional rights, would leave them at the mercy of officials whose goals of a tightly run, trouble



free institution ofttimes result in policies which conflict with the fundamental rights of prisoners.*

As noted in *Imbler v. Pachtman,* 424 U.S. 409, 421 (1976) this Court's decisions on the immunities afforded to government officials from constitutional claims are "not products of judicial fiat." The Defendant IDC members here do not meet the necessary prerequisites for "quasi-judicial" absolute immunity afforded to select executive officials as established in *Butz v. Economou,* 438 U.S. 478 (1978). They do not adjudicate in a process in which their independence guarantees the impartiality of their decisions, nor do there exist sufficient procedural safeguards at IDC proceedings to insure the reliability of their rulings. Therefore, to afford these prison officials absolute "quasi-judicial" immunity would be a radical and unwarranted extension of the doctrine as articulated in *Butz.* For these reasons, the judgment of the Court of Appeals below should be affirmed.

Respectfully submitted,

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*In fact, allowing a legal damage remedy for violations of constitutional rights furthers penological goals by providing prisoners a non-violent method of redress through which to channel their sense of having been wronged by prison officials.

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No. 84-732

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

THEODORE CLEAVINGER, MARVIN MARCADIS, and TOM P. LOCKETT,
Petitioners,

v.

DAVID SAXNER and ALFRED CAIN, JR.,
Respondents.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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# AMICI CURIAE BRIEF OF THE STATE OF CALIFORNIA ex. rel. JOHN K. VAN DE KAMP, ATTORNEY GENERAL; and the STATES OF ALABAMA, HAWAII, and WYOMING

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## QUESTION PRESENTED

Are prison disciplinary hearing officers protected by absolute immunity from 42 U.S.C. 1983 damages liability?

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No. 84-732

IN THE SUPREME COURT OF THE
UNITED STATES

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OCTOBER TERM, 1984

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THEODORE CLEAVINGER, MARVIN MARCADIS,
and TOM P. LOCKETT,

Petitioners,

v.

DAVID SAXNER and ALFRED CAIN, JR.

---

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

---

# AMICI CURIAE BRIEF OF THE STATE OF CALIFORNIA ex. rel. JOHN K. VAN DE KAMP, ATTORNEY GENERAL; and the STATES OF

ALABAMA, HAWAII, WYOMING

---

Amici file this brief pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States. This brief is respectfully submitted in support of petitioners who urge reversal of Saxner v. Benson (7th Cir. 1984) 727 F.2d 669 (cert. granted 2/19/85).

INTEREST OF AMICI

At issue is the extent of immunity from 42 U.S.C. 1983 damage suits for state and federal officials who adjudicate formal prison disciplinary hearings.

Amici advise and represent state correctional officers who, like petitioners, are assigned to serve on prison disciplinary boards. The state prison disciplinary process closely parallels that of the federal system. Thus the functional and procedural due process considerations are identical. The litigious record of state inmates against state officers is even more voluminous than



the staggering numbers noted by the Solicitor General's petition for certiorari here. In the twelve-month period ending June 30, 1984, for example, petitions by state prisoners to district courts totalled 26,581. (Annual Report of the Administrative Office of the United States Courts, 1984, Table 24.)

The necessity of absolute quasi-judicial immunity is thus one of critical interest to amici. Accordingly, it is requested that the contentions of amici be considered in this case.

- - - - - -

## SUMMARY OF ARGUMENT

Amici urge reversal of the Seventh Circuit's unexplained, unsupported curtailment of immunity for prison disciplinary hearings officers. The functions of these officials are adjudicative, and they must have the absolute immunity enjoyed by persons who perform similar duties. Otherwise, an element of defensiveness will creep into their judgments.

Anything less than absolute immunity for these officials will also sprout disturbing ramifications for a federal judicial docket already loaded with a disproportionate weight of prisoner cases.

The procedures and formalities required under the Due Process clause compel performance of a quasi-judicial function. Concomitant immunity must be accorded as well.

- - - - - -



## ARGUMENT

### I

### PRISON DISCIPLINARY OFFICIALS PERFORM QUASIJUDICIAL FUNCTIONS WHICH CANNOT BE CARRIED OUT EFFECTIVELY IF THREATS OF DAMAGE SUITS ARE OMNIPRESENT

The proper approach to quasi-judicial absolute immunity claims is to test the functions and safeguards of the prison disciplinary process. This Court made that clear in Butz v. Economou, 438 U.S. 478 (1978).

The nature of the functions performed by prison disciplinary officers brings them squarely within that group of quasi-judicial functions which public policy considerations have already accorded absolute immunity from damages liability. For example, parole board members enjoy absolute immunity from damage suits. (Martinez, et al. v. California, et al., 444 U.S. 277,

1980, pet. for rehg. den. 1980; Sellars v. Procunier, 641 F.2d 1295 (9th Cir. 1981); Anderson v. Boyd, 714 F.2d 906 (9th Cir. 1983); Trotter v. Klincar, 748 F.2d 1187 (7th Cir. 1984); see, also, Grimm v. Arizona Brd. of Pardons and Paroles, 564 P.2d 1227 (1977) and Hurst v. State of Wyoming (Wyo. Sup.Ct. 84-159 (1985).)

The public policy rationale for service on parole boards requires difficult judgments. Mistakes are inevitable and often disastrous. But absolute immunity from damages liability is essential if members are to serve with independence. The argument for parole board members is, however, less compelling than that for prison disciplinary officers. The judgment errors made by parole board members do not generate litigation by the person on whom they pass judgment, as do those of disciplinary officers. Litigation



over the release of a felon is typically brought by the victims of the felon's later crime -- or their survivors. To the extent that qualified immunity might hinder the officers' judgment, it would tend to influence them to deny parole. But the disciplinary officers' case for absolute immunity is even stronger: they must hear and decide matters which affect the inmates themselves, with knowledge that today's rule violator may well be tomorrow's civil rights plaintiff. Disciplinary board members thus present an even more compelling case for absolute immunity than parole board members whose immunity is already unquestioned.

Bar disciplinary committees immunity cases provide another excellent basis for a functional comparison. The adjudicative functions of the two groups are similar, as are the dynamics. Yet the Seventh Circuit found absolute immunity for the executive

secretary of Indiana's State Bar disciplinary committee. (Kissell v. Breskow, 579 F.2d 425 (1978); accord, Greene v. Zank (1984) 158 Cal.App.3d 497.)

The public policy rationale for absolute immunity by state bar disciplinary officials is also less compelling than that for prison disciplinary officers. Prison disciplinary officers necessarily make closer judgment calls on matters of more critical and immediate significance than do bar disciplinary officers.

Absolute quasi-judicial immunity has also been accorded administrative law judges and certain court functionaries, in the interest of their need for unfettered independence to make the judgments required by their jobs. (Tagliavia v. County of Los Angeles (1980) 112 Cal.App.3d 759; Taylor v. Mitzel (1978) 82 Cal.App.3d 665.)

The functions carried out by prison disciplinary officers are, by constitutional



mandate, even more formalized than the quasi-judicial function of parole boards, bar disciplinary committees, and other administrative officers. (Wolff v. McDonnell, 418 U.S. 539 (1974); see also Ward v. Johnson, 690 F.2d 1098, 1101-1104 (4th Cir. 1982). They must, therefore, be assured absolute immunity from damage suits by the inmates they judge. If officers assigned to serve as quasi-judges actually sit as future defendants and prospective judgment debtors, the process compelled by the Constitution will be so fundamentally modified as to defeat the very purpose of due process.

It has been suggested that officials' needs for independence can be adequately met by a qualified immunity which tests for good faith conformance to existing law. (See Butz v. Economou, supra, at p. 507-508.) Amici emphatically deny that the qualified immunity criteria are as

readily applicable as the Butz dictum suggests, for the reasons set forth below.

The criteria for qualified immunity were reformulated by this Court into a so-called "objective test" by this Court in Harlow v. Fitzgerald, 457 U.S. 800 (1982). By that test, an official's judgment is reviewed to see if it constituted a good faith effort to conform to settled law. (Id. at pp. 818-819.)

Amici submit that this standard is unworkable in the context of civil rights litigation over prison disciplinary hearings. On motion for summary judgment, factual issues about the hearing procedures will frequently swarm around the affidavits and counteraffidavits. Even where they do not, the officials whose judgment must be independent to preserve impartiality will, instead, be conferring with counsel to present their defense against inmates they



have had to judge. What constitutes "settled law" is not always clear-cut. Moreover, the liberal rules for prisoner complaint interpretation are such that artful, although conclusory, invocation of the Harlow standard will suffice to defeat a motion for judgment on the pleadings (Haines v. Kerner, 404 U.S. 519 (1972)0. The officials defending against such complaints will thus have to defend themselves through the discovery phase which, whatever its cathartic effect upon inmates, taxes the defendants and destroys their independence to judge.

II

## ABSOLUTE IMMUNITY DOES NOT LESSEN ACCOUNTABILITY, BUT ENSURES ITS PROPER PLACE IN THE BALANCED PRISON DISCIPLINARY PROCESS

Absolute immunity for prison disciplinary officers does not remove accountability from the prison disciplinary process. It merely keeps it in its proper

place in that process. A brief review of the remedies available to an aggrieved inmate after disciplinary hearing will illustrate this point. California's 45,590 inmates, for example, may challenge prison disciplinary actions by administrative appeals[1] and, thereafter, in state habeas corpus actions. Federal civil rights equitable remedies are available as well.

California's experience, like that of the federal Bureau of Prisons, has demonstrated that the remedy of institutional review is not a hollow one. (Saxner v. Benson, supra, at p. 681.) In fiscal year 1983-84, for example, First Level or informal appeals from California disciplinary actions

1. 15 Cal. Admin. Code section 3325. The United States Attorney General's certification of minimum appeals standards will ensure a meaningful administrative appeals remedy nationwide. (42 U.S.C. 1997e.)



were taken by 2,446 inmates.[2] Relief or partial relief was granted at this level in 579, or approximately 23 percent, of those appeals. (California Department of Corrections Inmate/Parolee Appeals Quarterly Reports for F.Y. 83-84, First Level.)[3] Second Level appeals from disciplinary actions during that same period totalled 3,175, of which 601 or approximately 18.9 percent were granted or partially granted. (Id., Second Level Reports.)

2. 41,575 prison disciplinary hearings for serious rule violations were conducted in California in fiscal year 1983-84. 896 serious rule violations were taken to hearings at Folsom State Prison in the first quarter of 1985.

3. These remedies, of course, are in addition to the credit restoration which is guaranteed according to pre-set published formulas after designated "discipline-free" periods. (15 Cal. Admin. Code 3328.)

As an additional protection, third-level review in California is carried out by a professional appeals unit which is independent of all institutional hierarchies at the prisons. 1,412 appeals were brought to this level in fiscal year 1983-84 for formal reevaluation. After investigation, interviews, and a full review for compliance with all procedural requirements, including the "preponderance of the evidence" standard of proof, appeals were granted or partially granted in 238 cases, approximately 16.8 percent. (Id., Third Level Reports.)

Administrative remedies are thus demonstrably effective in California at the administrative level, where inmates with complaints about disciplinary actions can obtain post-hearing review by institutional and then statewide appeals units with a record of fairness and objectivity.



The State of Illinois, with approximately 16,000 inmates and 102,636 disciplinary actions in fiscal year 1984, offers another example of a workable system of administrative review. Illinois, like California, has a tri-level structure for review of disciplinary actions in its prisons. After discipline has been imposed, inmates may take grievances to an Institutional Inquiry Board at the prisons.

Further appeals may be taken by personal appearance or statement to the Administrative Review Board, made up of three persons from outside the prison, one of whom must be a public member.

A third level of review is available to Illinois inmates facing a loss of more than 30 days of "good conduct credit" in twelve months. That review is before the Prisoner Review Board, an independent agency which reports to the Governor. (Ill. Rev.

Stats. Ch. 38, § 1003-6-3.) Illinois law requires that appointees to the Prisoner Review Board have at least five years' professional experience in penology or a related area. (Ill. Rev. Stats. Ch. 38, § 1003-3-2(a)(4); see also, Ohio Admin. Code, § 5120-9-09 which also has a tri-level system.)

Major states' experience with administrative appeals from disciplinary hearings thus establishes that inmates' remedies in the administrative arena are adequate. Moreover, many states already provide for broad equitable relief from adverse decisions of prison administrators. This is an important factor, also, in determining claims of absolute quasijudicial immunity. (See Sellars, supra, at p. 1303.) Petitions in error or for writs of habeas corpus offer a simple, flexible means for prisoner access to state courts. (See Cal.



Pen. Code, § 1473 et seq.; Neb. Rev. Stat. § 25-1901 et seq. (Reissue 1979); N.J. Const. (1947) art. VI, § V, ¶ 4.)

In California, the inmate also has potential recourse to all three judicial levels. (Cal. Const., art. 6, § 10.) For example, the California Supreme Court now has pending a state prisoner's habeas corpus action concerning the qualification of a confidential informant in camera. (In re Jackson, Crim. 24237, hg. granted, Dec. 13, 1984.) Jackson had been heard in the trial court and was the subject of a published Court of Appeal decision before the California Supreme Court granted hearing.

In summary, absolute immunity by prison disciplinary officers to damage suits in no way abrogates accountability for such officers' judgments. It simply structures the conflict resolution process so that the inevitable tension between the judge and the

judged can never compromise the judge's independence. (Bradley v. Fisher, 80 U.S. (13 Wall.) 646 (1872).) Just as the aberrant judge is accountable under a judicial misconduct process, the aberrant prison disciplinary hearing officer must account to his or her employer. (See, e.g., Cal. Gov. Code §§ 19572, 19573.) But susceptibility to inmate damage suits under 42 U.S.C. 1983 is a dangerous and ineffective means to accountability.

## CONCLUSION

Absolute immunity for prison disciplinary hearing officers does not reduce their accountability in the process of prison discipline. It merely ensures that the proper channels for decision and complaint are not mixed. Defensiveness by these judges against the judged must not penetrate into the carefully designed process for prison



disciplinary hearings, lest the independence which is essential to that process be lost.

Anything less than absolute immunity will sacrifice that independence, at untold cost to both those who litigate these cases and the court system in which they are litigated.

DATED: May 6, 1985

Respectfully submitted,

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DECLARATION OF SERVICE BY MAIL

Case Name: CLEAVINGER v. SAXON No. 84-732

I declare that I am employed in the County of Sacramento, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 1515 K Street, Suite 511, Sacramento, CA 95814.

On May 6, 1985 I served the attached AMICI CURIAE BRIEF OF THE STATE OF CALIFORNIA in said cause by placing a true copy thereof enclosed in a sealed envelope thereon fully prepaid, in the United States mail at Sacramento, California, addressed as follows:

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I declare under penalty of perjury the foregoing is true and correct, and that this declaration was executed at Sacramento, California on May 6, 1985.
(Date)

D. A. Gale
(Typed Name)

(Signature)

No. 84-732

Office-Supreme Court, U.S.
FILED
JUL 19 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

# Supreme Court of the United States

**October Term, 1984**

THEODORE CLEAVINGER, *ET AL.*,

*Petitioners,*

vs.

DAVID SAXNER AND ALFRED CAIN, JR.,

*Respondents.*

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Brief *Amici Curiae* of Prisoners' Legal Services of New York, Inc.; National Conference of Black Lawyers; National Lawyers Guild, *Amicus* Committee; National Legal Aid and Defenders Association; Alabama Prison Project; Southern Poverty Law Center (Alabama); Jerome N. Frank Legal Services Organization (Connecticut); Florida Justice Institute, Inc.; Legal Services for Prisoners, Inc. (Kansas); Prisoners' Assistance Project of the Legal Aid Bureau, Inc. (Maryland); Gay Community News Prisoner Project (Massachusetts); Massachusetts Correctional Legal Services; Mississippi Chapter of the National Conference of Black Lawyers; New York State Defenders' Association; Keystone Legal Services, Inc. (Pennsylvania); Defender General's Office of the State of Vermont; Institutional Legal Services Project of Evergreen Legal Services (Washington); and Wisconsin Correctional Services, in support of Respondents.

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IN THE

# Supreme Court of the United States

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**October Term, 1984**

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**No. 84-732**

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THEODORE CLEAVINGER, *ET AL.*,
*Petitioners,*

vs.

DAVID SAXNER AND ALFRED CAIN, JR.,
*Respondents.*

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

## Interest Of *Amici Curiae*

This brief is filed on behalf of Prisoners' Legal Services of New York, Inc.; National Conference of Black Lawyers; National Lawyers Guild, Amicus Committee; National Legal Aid and Defenders Association; Alabama Prison Project; Southern Poverty Law Center (Alabama); Jerome N. Frank Legal Services Organization (Connecticut); Florida Justice Institute, Inc.; Legal Services for Prisoners, Inc. (Kansas); Prisoners' Assistance Project of the Legal Aid Bureau, Inc. (Maryland); Gay Community News Prisoner Project (Massachusetts); Massachusetts Correctional Legal Services; Mississippi Chapter of the National Conference of Black Lawyers; New York State Defenders' Association; Keystone Legal Services, Inc. (Pennsylvania); Defender General's Office of the State of Vermont; Institutional Legal Services Project of Evergreen Legal Services (Washington); and Wisconsin Correctional Services, with the written consent of the parties as provided in Rule 42 of the Rules of this Court.

All of the national, state and local organizations listed above are committed to protecting the fundamental rights of underprivileged and incarcerated men and women throughout the United States. These groups service thousands of prisoner inmates who, without their help, would be left with no legal representation. *Amici* share a deep conviction that if correctional facility disciplinary officers are conferred absolute immunity when they violate inmates' rights in the course of their duties, inmates will be left ultimately without any ability to be compensated for or deter unconstitutional acts committed against them.

A full description and statement of interest of each of the organizations is set forth in the brief as Appendix A, *infra*.

## I. Summary Of Argument

Prison inmates no less than scions of society are entitled to sue for damages for harm suffered from deprivations of their federal constitutional rights by government officials. Since *Wolff v. McDonnell*, this Court has insisted that inmates must be provided constitutionally mandated due process safeguards before prison officials can punish them by stripping them of their liberty.

In both federal and state prison disciplinary systems, disciplinary committee members are responsible for ensuring that inmates are provided their constitutional rights. Similar to the vast majority of state prison disciplinary hearing officers, Bureau of Prisons Institution Disciplinary Committee [IDC] members are prison employees who possess few of the characteristics considered essential to permit their exercise of independent judgment. Like the majority of state procedures, those followed in the Bureau of Prisons' disciplinary system lack many of the due process safeguards considered crucial to ensure an objective and fair determination of the facts. Under these circumstances, neither IDC members nor state prison disciplinary committee members are entitled to shroud themselves with the exceptional shield of quasi-judicial absolute immunity when they violate the constitutional rights of inmates.

The absence of judicially equivalent procedural safeguards in federal and state prison disciplinary systems has more than theoretical implications. Researchers have uniformly found that where the hearing officer is a member of the prison corrections staff, and where only minimal procedures circumscribe the accused inmate's rights and the hearing officer's discretion, the cardinal function of the prison disciplinary hearing is to impose punishment rather than to uncover the truth.



As prisoners' advocates familiar with the prison disciplinary systems, *amici* have experienced what researchers have concluded. The New York State prison system, with the second largest prison population in the nation,[1] offers a revealing and typical example. The regulations governing New York's inmate disciplinary procedures provide inmates with little more than the fundamental rights dictated by *Wolff v. McDonnell*. Moreover, a single corrections official, who has many other duties in the prison unrelated to the disciplinary system, conducts the hearing. Consequently, as experience has demonstrated, the fact-finding component of the hearing is all but eliminated.

The Commissioner of New York's prison system recently conceded as much. He testified that when corrections officers physically assault inmates, they invariably charge inmates with physically assaulting them. Nevertheless, disciplinary hearing officers in New York prisons almost without exception find inmates guilty of physically assaulting corrections staff solely on the basis of the misbehavior reports written by the allegedly assaulted officers.

Given the potential for abuse in an insulated, prison-controlled, loosely structured inmate disciplinary system such as New York's, an inmate's ability to invoke the limited constitutional procedures available to defend himself or herself becomes critically important. Concomitantly, the possibility of a damage award against a hearing officer becomes the chief, if not only, mechanism to deter the officer's violations of an inmate's clearly established constitutional rights. An inmate's need for such deterrence is particularly acute because he or she will have incurred much of the harm resulting from the infringement of constitutional rights before a court can reverse the hearing officer's disposition.

[1] Address by Thomas A. Coughlin, III, Commissioner, New York State Department of Correctional Services, at Women and Prison Conference (May 17, 1985).

Conferring absolute immunity upon a prison disciplinary hearing officer in such circumstances will effectively render meaningless an inmate's constitutional due process protections.

The federal government and the states of California, Alabama, Hawaii, and Wyoming nevertheless complain that a tidal wave of frivolous inmate litigation will inundate the federal judiciary if this Court declines to exempt prison disciplinary hearing officers from financial liability for their plainly unconstitutional conduct. Because most existing precedent does not recognize hearing officer absolute immunity, this concern is baseless.

In addition, despite their protests to the contrary, there is no indication that without absolute immunity, hearing officers will be the targets of uncountable vexatious lawsuits. What the federal and state governments fail to mention is that a damage action cannot succeed, and in fact can be dismissed summarily on the administrative record, if the hearing officer chooses to provide rather than violate an inmate's few but important constitutional rights. Regardless, adequate procedural devices exist to protect hearing officers from the burden of defending against harassing litigation.

This Court should not compromise an inmate's ability to recover damages for injuries resulting from the violation of significant constitutional rights because of the government's implicit assertion that inmates' constitutional rights are less worthy of judicial protection than those of other individuals in society. In balancing the policy considerations, the dual goals of deterring and compensating for unconstitutional conduct clearly outweigh a prison disciplinary hearing officer's desire to act unconstitutional with impunity.



**II. The Conferral Of Quasi-Judicial Absolute Immunity Upon Prison Disciplinary Hearing Officers Is Not Justified Where Neither The Role Of The Hearing Officer Nor The Nature Of The Disciplinary Hearing Is Functionally Comparable To Its Respective Judicial Counterpart.**

Beginning with *Scheuer v. Rhodes*, 416 U.S. 232 (1974), this Court has stressed that executive branch officials are generally entitled to only qualified immunity from liability for damages stemming from unconstitutional acts committed in the performance of their duties. Emphasizing its significance, the Court observed that a damage award can serve to deter unconstitutional conduct as well as compensate for injuries. *Id.* at 238.

That prison officials are entitled to a qualified rather than an absolute immunity defense with respect to violations of inmates' constitutional rights was established in *Procunier v. Navarette*, 434 U.S. 555 (1978). The common law tradition of absolute immunity from damages for judges, however, remains intact even where unconstitutional conduct is involved. *See Pierson v. Ray*, 386 U.S. 547 (1967). *Cf. Pulliam v. Allen*, _____ U.S. _____, 104 S.Ct. 1970 (1984) (judicial absolute immunity poses no bar to prospective injunctive relief).

Against this background, this Court was confronted in *Butz v. Economou*, 438 U.S. 478 (1978) with the question of whether an executive branch official who conducted an administrative adjudicative proceeding was absolutely immune from liability for damages arising from the official's unconstitutional conduct in the course of the proceeding. While reaffirming that executive officials are generally barred from invoking an absolute immunity defense, the Court noted that the general rule is "subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of public business." *Id.* at 507. The *Butz* Court

then proceeded to create an "exceptional" and narrow "quasi-judicial absolute immunity" defense for executive branch adjudicative hearing officers who are "functionally comparable" to judges. *Id.* at 513.

Two factors were critical to this Court's determination that the chief hearing officer of the Department of Agriculture was functionally comparable to a judge, and must be analyzed in this case as well. First, the Court found that applicable law (specifically, the Administrative Procedure Act, 5 U.S.C. §554 *et seq.*) implements many of the procedural safeguards available in the judicial process.[2] Second, the Court determined that the powers of the hearing officer under the Administrative Procedure Act (APA) are comparable to those of a trial judge. *Id.*[3] As discussed by the Court, the judicially equivalent procedural devices in the APA were adopted to assure both the hearing officer's exercise of independent judgment and his or her insulation from agency or other outside influences. *Id.* at 513-14.

Applying this Court's carefully circumscribed criteria for granting quasi-judicial absolute immunity to the facts in this case, it is clear that Institution Disciplinary Committee [IDC] members are not entitled to invoke this ultimate defense. Indeed, based on *amici's* experiences

[2] The Court specifically referred to the following procedural protections:

> The proceedings are adversary in nature. See U.S.C. §555(b) (1976 ed.). They are conducted before a trier of fact insulated from political influence. See §554(d). A party is entitled to present his case by oral or documentary evidence, §556(d), and the transcript of testimony and exhibits together with the pleadings constitute the exclusive record for decision. §556(e). The parties are entitled to know the findings and conclusions on all of the issues of fact, law, or discretion presented on the record. §557(c). *Butz*, 438 U.S. at 513.

[3] The powers of the hearing examiner include the power to issue subpoenas, rule on evidence, regulate the course of the hearing, and make or recommend decisions. 5 U.S.C. §556(c).



with inmate disciplinary hearing systems throughout the country, it is evident that few, if any, disciplinary systems incorporate the procedural devices this Court deemed essential for a bestowal of absolute immunity on an administrative hearing officer.

As an initial matter, the differences between a prison disciplinary system's constitutionally mandated procedural safeguards as defined in *Wolff v. McDonnell*, 418 U.S. 539 (1974) and the procedures provided in the APA render the prison disciplinary process substantially less adversarial than hearings conducted under the APA. For instance, hearing officers may refuse to call an inmate's witnesses, and may limit an inmate's access to other inmates to collect statements without explaining why. *Ponte v. Real*, _____ U.S. _____, 53 U.S.L.W. 4549 (May 21, 1985); *Wolff*, 418 U.S. at 566. Inmates are not entitled to confront or cross-examine adverse witnesses. *Wolff*, 418 U.S. at 567-68. Nor are prisoners constitutionally entitled to counsel or a substitute precisely because:

> [t]he insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversarial cast and tend to reduce their utility as a means to further correctional goals. *Id.* at 570.

Additionally, and perhaps most significantly, it is constitutionally permissible for a hearing officer to have other custodial, security-related, and programmatic responsibilities for the daily operation of the prison, thereby diminishing the officer's capacity to act independently. *Id.* at 570-71. The hearing examiners in the Department of Agriculture, on the other hand, perform their adjudicatory duties as their sole functions.

It is apparent that the *Wolff* Court envisioned prison disciplinary hearings as informal, nonadversarial proceedings in which hearing officers are neither constrained by the procedural safeguards which govern judges and other administrative adjudicators, nor authorized to invoke judicially comparable powers. Thus, in a constitutional sense, the prison disciplinary hearing

officer is simply not functionally comparable to a judge. *Butz*, 438 U.S. at 513.

Nor is a prison disciplinary hearing officer functionally comparable to a judge in a practical sense. Although a handful of states provide inmates with greater procedural protections than are required by *Wolff*, *see, e.g.*, *Avant v. Clifford*, 67 N.J. 496 (1975), it is *amici's* experience that the vast majority of state prison disciplinary systems encompass only the basic requirements. *See, e.g.*, *Hilliard v. Scully*, 537 F.Supp. 1084 (S.D.N.Y. 1982).

**III. The Overwhelming Majority Of State Prison Disciplinary Systems, Including Those Of *Amici* States, Incorporate Few, If Any, Of The Judicially Equivalent Characteristics Regarded As Critical To A Bestowal Of Quasi-Judicial Absolute Immunity Upon Administrative Hearing Officers.**

The written procedures governing prison disciplinary proceedings promulgated by individual states sharply contrast with the hearing procedures examined by this Court in *Butz*.[4] As a general rule, inmate disciplinary

[4] The information in this section was gleaned from several sources. Available to *amici* were current state prison disciplinary system regulations from the following states: Alabama, California, Colorado, Hawaii, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Vermont, Washington, Wisconsin, and Wyoming. For information about other state systems, *amici* relied on a survey of the disciplinary systems in forty-one states, Guam, and the Federal Bureau of Prisons published in 6 *Corrections Compendium* No. 5, 3-7 (1981), and a comprehensive analysis of a 1980 survey of disciplinary systems in forty states, the District of Columbia, and the Federal Bureau of Prisons, published in Babcock, "Due Process in Disciplinary Proceedings," 22 *B.C.L. Rev.* 1009 (1981) & n.38, 1051-83. *Amici* also referred to B. Marin, *Inside Justice* (1983), an exhaustive study of the prison disciplinary systems in the United States and Great Britain. Unless otherwise indicated, the information summarized in this section derives from the most current sources available to *amici*, as described in this footnote.



hearings around the country are nonadversarial in nature and are conducted by untrained and inexperienced corrections staff who double as hearing officers.[5]

Charges filed against an inmate are heard by a disciplinary committee comprised of one or more members. In all but three states, hearing board members are corrections and administrative staff within the prison where the inmate resides, and are under the direct supervision of the facility's warden. The states of California, Hawaii, Arizona, and Wyoming, *amici* on the government's behalf, are among the majority of jurisdictions who use prison employees as hearing officers. Only one state, Michigan, uses hearing officers who as employees of an independent hearing division within the state corrections department, function exclusively as hearing officers.

Although twenty-four state systems bar the charging officer from serving on the hearing panel, the remaining systems apparently have no such prohibition. Corrections staff with direct knowledge of or involvement in the alleged incident are explicitly excluded from disciplinary committees in merely five states.

All states have regulations that allow the charging officer or another prison official to confine the inmate immediately after a violation is reported if the violation is deemed serious. When an inmate is confined in this way, most states assign a prison employee to obtain evidence for the inmate before the hearing. The employee, however, does not keep the gathered information confidential. Rather, the employee reports directly to the disciplinary hearing committee when the

[5] *See* Marin, *supra* note 4, at 130-215; Babcock, *supra* note 4, at 1051-82; Jacob and Sharma, "Disciplinary and Punitive Transfer Decisions and Due Process Values in the American Correctional System," 12 *Stetson L. Rev.* 1, 7-29, 71-134 (1982); Note, "Noble Holdings as Empty Promises: Minimum Due Process at Prison Disciplinary Hearings," 7 *New Eng. J. Prison L.* 145, 152-177 (1981).

investigation is complete, regardless of whether the information is favorable or harmful to the inmate.

As mandated by *Wolff v. McDonnell*, most states' regulations allow a prison employee to provide limited assistance to an inmate who is illiterate or unable to understand the charges. In *amici's* experience, however, an assistant is rarely assigned despite the high percentage of the prison population which is mentally ill or retarded and unable to prepare an adequate defense to the charges.[6]

Twenty-seven states permit an inmate to have a lawyer or civilian advocate present at the hearing to help present evidence. Because few inmates have the financial resources to hire attorneys to attend prison hearings, however, and because the time between the charges and the hearing is usually short, this privilege is rarely utilized.[7]

Raw statistics indicate that twenty-eight jurisdictions allow the accused or his or her legal representative to question the witnesses, or at least the charging officer. In almost all twenty-eight, however, this procedure is limited by the hearing officer's ability to exclude the accused inmate from the hearing, to restrict the accused inmate to the submission of written questions only to the hearing panel, and to allow the witness to refuse to answer.

Virtually all jurisdictions permit accused inmates to call their own witnesses, but none gives inmates the

[6] For example, in a telephone conversation on January 8, 1985, Richard Lester, Health Care Coordinator in Attica Correctional Facility in New York, stated that 40% of inmates at Attica have active psychiatric files. Similarly, a survey of prisoners in five California counties revealed that 37% were mentally ill, with half of those inmates suffering from personality disorders. President's Commission on Mental Health, *Report of the Task Panel on Legal and Ethical Issues* 1455 (1980).

[7] *See* Babcock, *supra* note 4, at 1938-40.



absolute right to call anyone they wish. At least twenty-five states expressly confine an inmate's witnesses to those who will provide only "relevant" and "noncumulative" testimony, as decided by the hearing officer. Regulations requiring written explanations of reasons for not calling an accused inmate's witnesses exist in only fifteen jurisdictions. No state system allows inmates to subopena reluctant witnesses.

The evidence which disciplinary committee members are entitled to rely on in determining an inmate's guilt is extremely broad, thereby restricting an inmate's ability to defend himself or herself. No disciplinary system requires the application of formal evidentiary rules; all permit the introduction of hearsay. Only four states require testimony under oath. At least seven jurisdictions specifically provide that the written misbehavior report is enough evidence to find an inmate guilty. Other jurisdictions yield the same result by failing to specify in their regulations the requisite type or quantum of inculpatory evidence.

To summarize, regulations which implement prison disciplinary systems provide, for the most part, little more than those procedures which are constitutionally mandated, and a great many fewer than the *Butz* Court considered crucial in evaluating a claim of quasi-judicial absolute immunity. In fact, like most states, the four state *amici* of the government provide inmates with very few procedural protections. Of the several safeguards analyzed in *Butz*, including representation by a lawyer, power to subpoena witnesses, ability to conduct prehearing discovery, testimony given under oath with cross-examination permitted, submission of rebuttal evidence, preparation of a verbatim transcript, and independence of the hearing officer, California and Hawaii provide only the right to submit rebuttal evidence. Inmates in Alabama and Wyoming do not fare much better. Of the *Butz* procedural protections, these states provide only the right to submit rebuttal evidence and a transcript of the hearing.

## IV. Where A Prison Disciplinary System Does Not Incorporate Procedures Adequate To Protect Its Judgmental Independence, It Does Not Operate As A Judicially Comparable Administrative Tribunal Which Would Warrant The Conferral Of Absolute Immunity Upon Hearing Officers.

### A. Nationwide Research Uniformly Reveals That Inmate Disciplinary Hearings Over Which Prison Staff Preside Function Chiefly To Impose Punishment On Inmates And To Brandish Prison Officials' Authority, But Rarely To Determine An Inmate's Guilt Or Innocence.

The absence of all but rudimentary procedural protections in the majority of inmate disciplinary systems has far more than abstract statistical or jurisprudential significance. Empirical research demonstrates that most disciplinary systems function not as guilt-determining proceedings but as disposition-dispensing forums. Stated differently, an inmate's guilt is virtually always presumed; the practical function of a prison employee who doubles on occasion as a hearing officer is merely to impart punishment.[8]

Research further reveals that the dispositions which are meted out at skeletal disciplinary hearings have little correlation to the misconduct they are intended to punish. Rather, punishments are much more related to extraneous factors such as the hearing officer's prior familiarity with the inmate, the officer's impressions of the inmate's attitude at the hearing, the inmate's overall disciplinary record, and, perhaps surprisingly, the inmate's age and marital status at the time of his or her admission.[9] Perhaps not surprisingly, it is also clear that

[8] *See* Marin, *supra* note 4, at 208; Flanagan, "Discretion in the Prison Justice System: A Study of Sentencing in Institutional Disciplinary Proceedings," 19 *J. Research Crime & Delinq.* 216, 234 (1982); Harvard Center for Criminal Justice, "Judicial Intervention in Prison Discipline," 63 *J. Crim. L., Criminology and Police Sci.* 200, 223 (1972); Jacob and Sharma, *supra* note 5, at 72 & n.339.

[9] Marin, *supra* note 4, at 208; Flanagan, *supra* note 8, at 231-34; Gifis, "Decision-making in a Prison Community," in *The Invisible Justice System: Discretion and the Law* 317-35 (B. Atkins and M. Pogrebin ed. 1978); Harvard Center for Criminal Justice, *supra* note 8, at 216; Jacob and Sharma, *supra* note 5, at 30.



race prejudice against minority inmates by corrections staff has a significant role in the apportionment of punishment.[10]

Researchers attribute these phenomena to the absence of the procedural safeguards the *Butz* Court found essential to independent, influence-free decision-making, and the concomitant wide latitude allowed hearing officers at every stage in the proceedings.[11] Dominating the causal factors is the use of disciplinary committee members who work primarily as prison corrections staff and only incidentally as hearing officers.[12]

The precise extent to which this virtually universal feature of prison disciplinary systems affects the outcome of disciplinary hearings is not easy to assess. Nonetheless, analysts have unanimously observed what Judge Cudahy, concurring in the decision below, deduced: the use of a hearing officer who is also a prison staff member is inimical to a fair and impartial determination of an inmate's alleged misconduct. *See Saxner v. Benson*, 727 F.2d 669, 675 (7th Cir. 1984).

Researchers point out that the hearing officer's employee status affects his or her assessment of the charges against the inmate in a number of adverse ways. Hearing officers are inevitably friends, acquaintances, and fellow workers of the corrections officials who file

[10] Babcock, *supra* note 4, at 1059; Poole and Regoli, "Race, Institutional Rule Breaking, and Disciplinary Response: A Study of Discretionary Decision Making in Prison," 14 *Law & Soc'y Rev.* 931-46 (1980); Ramirez, "Race and the Apprehension of Inmate Misconduct," 11 *J. Crim. Just.* 413, 423-24 (1983).

[11] Babcock, *supra* note 4, at 1095-96; Jacob and Sharma, *supra* note 5, at 71-72, 76, 92-94; Note, *supra* note 5, at 191-92; *see also* Poole and Regoli, *supra* note 10, at 942-43; Ramirez, *supra* note 10, at 425. *See generally* Flanagan, *supra* note 8.

[12] Babcock, *supra* note 5, at 1095-96; Harvard Center for Criminal Justice, *supra* note 8, at 210-11; Jacob and Sharma, *supra* note 5, at 14, 19-99; Note, *supra* note 5, at 160-64.

charges against the inmates they judge. The institutional and personal pressures upon hearing officers to support their friends and co-workers is difficult, if not impossible, to avoid. Hearing officers often feel that dismissal of charges will have a negative impact on overall prison discipline.[13] Some investigators have noted that, "dismissal of a disciplinary charge implies that the reporting staff was wrong. For the morale of the rank and file correction officers, such inferences cannot be permitted."[14] Other researchers have emphasized that:

> Board members may not act impartially because they feel that their duty is to support the staff in all cases. As one Board member put it, "The philosophy in the past had always been back up your officers, whether they are right or wrong."[15]

Directly related to the hearing officer's daily contact and familiarity with other correction staff is the all but irrebuttable presumption of credibility they accord to their fellow officers, and the corresponding barely rebuttable presumption against credibility they accord to inmates.[16] In a landmark study which, though published more than a decade ago, is cited extensively today due to its enduring vitality, the Harvard Center for Criminal Justice concluded:

> The presumption of credibility must be against the inmate if the members of the Disciplinary Board are to continue to be on good terms with the charging and superior officers with whom they work daily. This maintenance of staff morale is reflected not only in the minimization of the fact-finding

[13] Flanagan, *supra* note 8, at 217.

[14] G. Kassebaum, D. Ward, and D. Wilmer, *Prison Treatment and Parole Survival: An Empirical Assessment* 53 (1971).

[15] Harvard Center for Criminal Justice, *supra* note 8, at 210. *See also id.* at 210-11.

[16] Flanagan, *supra* note 8, at 217-18; Harvard Center for Criminal Justice, *supra* note 8, at 200; Jacob and Sharma, *supra* note 5, at 14.



> process, but also in the types of conduct subject to disciplinary action.[17]

Likewise, a correction officer's familiarity and previous interactions with an inmate, and knowledge of the inmate's disciplinary history, will influence his or her determination, as a hearing officer, of the inmate's guilt or innocence.[18] Finally, corrections staff who act as hearing officers rarely have legal training and have little, if any, specialized training in the protection of an inmate's constitutional due process rights.[19]

**B. A Close Examination Of New York's Inmate Disciplinary System Confirms That Without Judicially Comparable Procedural Safeguards, An Inmate Disciplinary System Functions In A Manner Radically Different From The Independent Hearing Which The *Butz* Court Regarded As Fundamental To A Consideration Of A Hearing Officer's Entitlement To Absolute Immunity.**

Among researchers, there is little doubt that the utilization of prison corrections staff as hearing officers and the absence of judicially equivalent procedural safeguards adversely affect the purpose of a disciplinary hearing to arrive at a fair and objective result. What researchers have observed on a systemwide basis is observed as well by prisoners' rights advocates, such as *amici*, who are intimately familiar with individual inmate disciplinary systems. New York's inmate disciplinary system graphically illustrates the ramifications of a prison disciplinary process which operates without the safeguards against influence and prejudice which the *Butz* Court found essential to objective and impartial

[17] Harvard Center for Criminal Justice, *supra* note 8, at 223.

[18] Harvard Center for Criminal Justice, *supra* note 8, at 217; Jacob and Sharma, *supra* note 5, at 96-97.

[19] Jacob and Sharma, *supra* note 5, at 92-93, 95-96.

quasi-judicial decision-making. *Butz v. Economou*, 438 U.S. at 512.[20]

Like most other states, New York State's prison disciplinary system incorporates only the basic constitutionally mandated procedures.[21] When an inmate is given notice of the charges, he or she may be placed in solitary confinement for up to seven days prior to a hearing. If the inmate is confined to a cell or is illiterate, a prison employee will be designated to help the inmate prepare a defense, generally by interviewing the witnesses requested by the inmate. Although these interviews are ostensibly for the inmate's benefit, the written results of the interviews are almost always provided to the hearing officer.

The single hearing officer must be a high-ranking or "designated" employee of the Department of Correctional Services. Except in rare situations, the hearing is conducted by a corrections staff member of the prison where the inmate is confined. The sole limitation placed on the hearing officer is that he or she cannot have witnessed, investigated, or been involved in the alleged misbehavior.

The regulations allow the hearing officer to rely exclusively on the written charges to find an inmate guilty of misbehavior; testimony by an adverse witness

[20] New York's inmate disciplinary system has been the focus of observation and litigation by Prisoners Legal Services of New York since 1975. *See Bounds v. Smith*, 430 U.S. 817, 831 n.20 (1977). According to Donald Selsky, Coordinator of Inmate Disciplinary Programs for the New York State Department of Correctional Services, approximately 1000 superintendent's hearings per month are conducted in New York State prisons. Affidavit of Donald Selsky, submitted in *Matter of Jones v. Smith*, 64 N.Y.2d 1003 (1985), May 21, 1984.

[21] The procedures governing New York's inmate disciplinary system are found at 7 N.Y.C.R.R. §§250-70 (1983). The description of New York's disciplinary process that follows is based on the applicable regulations as well as Prisoners Legal Services' advocates' knowledge about the implementation of the regulations.



is not required.[22] In the isolated hearing where the hearing officer interviews the correction officer who wrote the charges, the accused inmate will almost always be excluded from the hearing in the interest of "security."

The hearing officer may interview witnesses requested by the accused inmate, but only if he or she deems their testimony "material or not redundant," and if calling the witness "does not jeopardize institutional safety or correctional goals." 7 N.Y.C.R.R. §254.5. If an accused inmate is confined to solitary confinement pending the hearing, odds are extremely high that the hearing officer, again in the interest of "security," will exclude the inmate from the hearing while his or her own witnesses are interviewed.

In no case may an accused inmate directly question his or her own witnesses. In no case may an accused inmate cross-examine any adverse witnesses who testify. In no case may a lawyer, paralegal, employee assistant, or inmate assistant be present at the hearing to help the accused inmate present his or her defense.

Because of the lack of procedures normally implemented to assure a judicious outcome, abuse of the inmate disciplinary system by corrections officials is both predictable and common. The hearing officer's incentive to consider other than the barest accusations as proof of an inmate's guilt is nonexistent. The accused inmate's ability to rebut the inculpatory evidence and present a meaningful defense is minimal.

In New York, as in the federal and other prison disciplinary systems, the impact of a battery of hearing

[22] This aspect of New York's disciplinary regulations is currently being litigated in the New York State courts. *Compare Matter of Jones v. Smith*, 101 A.D.2d 705 (4th Dep't 1984), *aff'd on other grounds*, 64 N.Y.2d 1003 (1985) and *Matter of Santana v. Coughlin*, 105 A.D.2d 789 (2d Dep't 1984) *with Matter of Garcia v. LeFevre*, 102 A.D.2d 1004 (3rd Dep't 1984), *rev'd on other grounds*, 64 N.Y.2d 1001 (1985).

officers who are principally prison corrections staff with supervisory responsibilities, security-related functions, and a number of other duties within the prison, cannot be overemphasized. In their chief capacities, they come into daily contact with, and form opinions about, the inmates they judge as hearing officers. They work daily with, and are often friends of, the corrections officers who write the misbehavior reports upon which they rely to determine an accused inmate's guilt. Certainly, it strains reality to suggest that under these circumstances hearing officers are methodically able to segregate their personal biases about their wards, fellow employees and friends from their obligation to evaluate the evidence before them.

The sworn statements of a former Deputy Superintendent at Auburn Correctional Facility in New York reflects this inescapable consequence, observed without exception by researchers. Former Deputy Superintendent Abraham Taylor was deposed in conjunction with a lawsuit by former inmate Ron Johnson who suffered a broken leg in a confrontation with guards who Johnson alleged wielded axe handles. Following the incident, Johnson was found guilty of and punished for assaulting the guards at a disciplinary hearing conducted by Taylor.

Taylor had been Deputy Superintendent for eight years at the time of his deposition in 1980. He testified that he held ten to twelve hearings monthly.[23] Taylor regarded all Auburn employees, including himself, as "one family."[24] Many Auburn correction officers were his close friends.[25] Taylor frankly admitted he leaned toward believing the reports and testimony of guards over the testimony of inmates.[26] Although he would dismiss

[23] Transcript of deposition of Abraham Taylor in *Johnson v. Colton* (N.Y. Sup. Ct., Cayuga Cy.), November 7, 1980, at 11.

[24] *Id.* at 29.

[25] *Id.*

[26] *Id.* at 9-10, 13-15.



charges against an inmate if he were convinced the inmate was innocent and the guards were lying, he had never dismissed all charges against an inmate in all the years he had presided over hearings.[27] Taylor testified that, since the charge against Johnson was that he had assaulted guards, Johnson's statements that he had been beaten by axe-wielding guards was irrelevant, although he knew of Johnson's broken leg.[28] Johnson's case was ultimately settled for, *inter alia*, a damage award.

The potential for abuse in New York State's prisoner disciplinary system is so transparent that even the Commissioner of New York's Department of Correctional Services has tacitly acknowledged its inadequacies, albeit in a different context. Commissioner Thomas A. Coughlin, III recently testified in court in support of the tactics used by the Inspector General of the Department of Correctional Services to investigate physical assaults of inmates by corrections staff. Under oath, the Commissioner candidly stated:

> [I]n my experience. . ., if there is an assault—an alleged assault by Corrections Officers on inmates, the Corrections Officers usually all tell the same story. . .[T]he usual story is that the inmate assaulted them first and they responded with appropriate use of force.[29]

The Commissioner further testified that he has "had a problem in this Department for four and one-half years with Corrections Officers beating up inmates,"[30] that corrections officers have a "code of silence,"[31] and that in the dozens of cases of alleged physical abuse of inmates

[27] *Id.* at 9-10, 29-30.

[28] *Id.* at 12-13, 16.

[29] Transcript of testimony in *Matter of Brian F. Malone, Attorney, and Committee on Professional Standards* (N.Y. App. Div. 3rd Dep't), (January 20, 1984), at 18.

[30] *Id.* at 28.

[31] *Id.* at 18.

by correction officers he investigated, no correction officer had ever testified against another.[32]

Under the procedures followed in New York's disciplinary system, it is commonplace for an inmate to be found guilty of physically assaulting a corrections officer solely on the basis of the written charges filed by the corrections officer against the inmate, regardless of the vehemence of the inmate's denial and the credibility of his or her supporting witnesses. Yet, as conceded by Commissioner Coughlin, it is virtually common knowledge that an inmate who has been physically assaulted by a corrections officer will be both accused and found guilty of physically assaulting the corrections officer.

The large potential for manipulating New York's disciplinary system to the detriment of the inmate is apparent in other situations as well. In *Morrison v. LeFevre*, 592 F.Supp. 1052 (S.D.N.Y. 1984), the court found after a lengthy evidentiary hearing that several corrections officers conspired to frame Thomas Morrison, an inmate at Green Haven Correctional Facility, for the possession of contraband. As a result of the corrections officers' conduct, Morrison was punished, ostensibly in accordance with New York's disciplinary procedures. The court determined, however, that Morrison was deprived of several of his constitutional due process rights before and during his disciplinary hearing. *Id.* at 1072-73. Defendants, including the hearing officer, were ordered to pay Morrison compensatory damages.

As implied by Commissioner Coughlin, the filing of false charges against inmates by corrections officers is not unusual. What makes *Morrison* unique, however, is that it was, in Judge Sofaer's words, "one of those rare cases. . .in which a prisoner has succeeded in proving he

[32] *Id.* at 17-18.



was subjected to just such a violation of his constitutional rights [by being framed]." *Id.* at 1056.[33]

Refuting one's guilt at a New York disciplinary hearing is virtually impossible where written charges are almost always considered more credible than an accused inmate's verbal denial and the corroborating testimony of his or her witnesses. Indeed, Morrison was able to establish his innocence only in a strictly monitored neutral forum where he was afforded all the procedural protections lacking at his disciplinary hearing, such as the assistance of a legal advocate, the opportunity to cross-examine adverse witnesses, and the ability to use available discovery tools. That the inmate disciplinary system so readily enabled Morrison to be punished for misbehavior despite his innocence is a testament to the inherent problems of proving one's innocence in a system devoid of strict procedural safeguards.

## V. Granting Absolute Immunity To Disciplinary Hearing Officers Will Leave Inmates Whose Constitutional Rights Have Been Violated With No Effective Means Of Deterring Unconstitutional Conduct Or Of Compensating Them For Harm They Incurred When The Hearing Officers Infringed Their Rights.

When an inmate is disciplined within a prison system, the possible sanctions imposed on him or her can be characterized as falling within one of two broad areas. First, the inmate can spend a longer period of time in prison as a result of loss of good time. Second, the inmate can be immediately punished by placement in solitary confinement, loss of all prison privileges, and other restrictions on the liberty of the inmate.

[33] *See also Pino v. Dalsheim*, 605 F.Supp. 1305 (S.D.N.Y. 1984), where the court held that the hearing officer's actions at plaintiff's disciplinary hearing "extend[ed] the mockery of due process begun by the employee assistant and render[ed] the [hearing] an empty formality." *Id.* at 1318.

In those cases in which the penalty imposed is loss of good time, and the disciplinary procedures followed violated the inmate's constitutional rights, a meaningful remedy exists to make the inmate whole. The good time which was taken from the inmate's record is simply restored, and the record of its loss in the first place is expunged. On the other hand, when an inmate is wrongly punished by locking him or her in solitary confinement, there exists no meaningful remedy save that of damages.

Such a penalty involves a serious loss of liberty. Although a prisoner's "liberty" is severely restricted simply by virtue of his or her incarceration, a sentence to solitary confinement entails a further curtailment of liberty vastly greater than that afforded to inmates within the general population of the prison.

Typically, such inmates are confined to solitary confinement cells twenty-three to twenty-four hours per day. Their ability to shower is reduced from daily to perhaps once weekly. The inmates are typically denied telephone privileges, the right to receive packages, the right to buy goods at the commissary, and the right to earn "points" which may be used to enjoy privileges such as family visits. There are often restrictions on food, both in selection and in quantity. Opportunities for indoor or outdoor recreation are severely limited, often to one hour daily or even none at all. The opportunity to participate in group religious services is eliminated. Access to legal materials is often more restricted than in the general population. The inmates are unable to participate in work or training programs, and thus are prevented from earning what little wages would otherwise be available to them. Visits may be strictly limited to legal visits; personal contact with family members and friends may be prohibited. Inmates are denied contact with other prisoners.



In the restrictive confines of a prison, an inmate's freedom to leave his or her cell, participate in prison programs, and take advantage of prison opportunities is an exceedingly precious commodity; its deprivation by the government is a deprivation of monumental magnitude. Even a relatively short confinement of several days or weeks would constitute a grievous loss of liberty which cannot be remedied simply by declaring that it was ordered illegally or by expunging references to the proceeding in the inmate's records. Once the time is spent in solitary, it is lost forever to the inmate.

A cursary examination of records of disciplinary proceedings, however, reveals that many dispositions involve sentences to solitary confinement of months or even years.[34] In such cases, the deprivation of liberty is exacerbated and the inadequacy of a remedy excluding damages is magnified. These sentences are all the more serious in light of the considerable length of time which appeals take, both administratively and in the courts.

For example, in New York State a disciplinary hearing disposition which imposes over thirty days of solitary confinement must be appealed to the Commissioner of the Department of Correctional Services. Regulations require that a decision be rendered by the Commissioner within sixty days of receipt of the appeal. Experience shows, however, that decisions are rarely, if ever, forthcoming in fewer than sixty days, and are frequently issued three months or more after the appeal was received.

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[34] In *amicus* Prisoners Legal Services' experience, disciplinary dispositions of six months to a year and a half in solitary confinement are common and are often extended by similar sentences when inmates are punished for misconduct which allegedly occurs while the inmates are still in solitary confinement.

Following an unfavorable administrative appeal decision, the inmate may apply to state court to review the decision. This process can be expected to encompass at least another six to eight weeks, but is more likely to exceed two months. If an appeal to a higher court is made, of course, the process can take at least several months longer.[35]

Thus, an inmate who has been sentenced to solitary confinement in violation of his or her constitutional rights may end up serving several months of, if not the entire sentence before his or her rights are vindicated. This amount of time is surely not insignificant in light of the degree of deprivations imposed on the disciplined inmate. To deny such an aggrieved inmate the right to damages as a matter of course would be a miscarriage of justice of the highest degree.

**VI. The Refusal To Endow Prison Hearing Officers With Absolute Immunity Will Neither Increase The Burden On The Courts Nor Force Hearing Officers To Defend Themselves Against Multitudes Of Frivolous Lawsuits.**

No doubt because their other arguments have little merit, the federal and state *amici* governments conjure up the effete image of a floodgate of frivolous litigation inundating the federal judiciary if the decision below is affirmed. In the government's and *amici's* view, if this Court rules that hearing officers are not afforded absolute immunity, inmates will descend upon the

[35] In this regard it is worthy of note that the government may appeal an unfavorable decision made at a lower court level. In New York, when the state files a Notice of Appeal from a decision favorable to the inmate, a stay of the order is automatically granted to the state pending appeal. N.Y.C.P.L.R. 5519. Further, New York State courts have held that *habeas corpus* relief, which is not automatically stayed by the state's appeal, is not available to an inmate who seeks to be released from solitary confinement into the general prison population. *People ex rel. Corcoran v. Smith*, 105 A.D.2d 1142 (4th Dep't 1984).



courthouses throughout the country in unprecedented numbers with complaints in hand, eager to avail themselves of the newly created opportunity to sue hearing officers.

Such a dire prediction is itself frivolous. In the first place, it presumes that, until now, disciplinary hearing officers have been shielded by absolute immunity. On the contrary, since this Court ruled in *Procunier v. Navarette, supra*, that prison officials are generally entitled to invoke merely qualified immunity, only Virginia's and North Carolina's prison disciplinary systems have been found by a federal circuit court to be "functionally comparable" to a judicial hearing such that absolute immunity for their hearing officers was warranted. *See Segarra v. McDade*, 706 F.2d 1301 (4th Cir. 1983); *Ward v. Johnson*, 690 F.2d 1098 (4th Cir. 1982). Other circuit courts have either held that hearing officers are immune from financial liability, *see King v. Wells*, 760 F.2d 89, 95 (1985); *King v. Higgins*, 702 F.2d 18 (1st Cir.), *cert. denied*, 464 U.S. 965 (1983), or have affirmed damage awards against hearing officers without speaking to the immunity issue. *See McCann v. Coughlin*, 698 F.2d 112 (2d Cir. 1983). As a result, the understandable assumption of *pro se* inmate litigants and their legal advocates has been that hearing officers are not absolutely immune from lawsuit, and they have sued accordingly. There is, therefore, simply no basis for the proposition that the number of lawsuits against inmate disciplinary hearing officers will rise dramatically if this Court denies the government's appeal.

Nor is there any basis to believe that prison hearing officers will face a heavy burden in defending themselves against frivolous inmate lawsuits if this Court declines to cloak them with absolute immunity. As this Court previously recognized:

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. . . . [F]irm application of the Federal Rules of Civil Procedure will ensure that . . . officials are not harassed by frivolous lawsuits. *Butz v. Economou*, 438 U.S. at 507.

Many civil rights lawsuits involve contested allegations which can be resolved only by an evaluation of witness testimony, such as physical brutality charges against police officers or prison guards. In contrast, the transcript of the disciplinary hearing will reveal in most cases whether a hearing officer denied an inmate his or her constitutionally mandated procedural rights. As such, a motion to dismiss or for summary judgment will frequently be an adequate device to determine a hearing officer's liability.[36] Only in those cases where liability is established might an evidentiary hearing be necessary to determine the damage award. *See McCann v. Coughlin*, 698 F.2d at 126-27.

Other procedural devices exist as well to protect a hearing officer against vexatious lawsuits. Rule 11 of the Federal Rules of Civil Procedure provides that if a signed paper is interposed for improper purposes, sanctions are to be imposed on the offender. A litigant can be held in contempt and liable for expenses and attorneys fees if a bad faith affidavit is submitted in support of a motion for summary judgment. Fed.R.Civ.P. Rule 56(g). Attorneys fees can be awarded against even a *pro se* litigant who sues in bad faith. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Gerena-Valentin v. Koch*, 739 F.2d 755, 761 (2d Cir. 1984).

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[36] The use of summary judgment to resolve these cases will be even more appropriate following this Court's decision in *Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, _____ U.S. _____, 53 U.S.L.W. 4778 (June 17, 1985), which effectively eliminated an inmate's right to federal court review of the correctness of the guilty determination.



Besides these procedures, the federal courts' ability to deny motions to proceed *in forma pauperis* under 28 U.S.C. §1915(d) on the ground of frivolousness is especially useful in preventing prison hearing officers from being subjected to harassing lawsuits. This screening device, which is invoked frequently by federal district courts, permits the dismissal of frivolous complaints before they are served on defendants.[37] The overwhelming majority of inmates who file civil rights lawsuits also move to proceed *in forma pauperis*. As such, this procedure operates to keep prison disciplinary hearing officers more than other administrative hearing officers from ever knowing that frivolous lawsuits were filed against them.[38]

In short, denying the governments' attempt to immunize absolutely prison disciplinary hearing officers will neither increase the burden on the federal courts nor subject the officers to scores of frivolous lawsuits. What the United States, California, Arizona, Wyoming, and Hawaii conveniently fail to acknowledge, however, is that the easiest way for hearing officers to avoid financial

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[37] The use of this screening tool, according to one study, results in the dismissal of over two-thirds of all prisoners' civil rights lawsuits. Turner, "When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts," 92 *Harvard L.R.* 610, 617-19 (1979).

[38] Recent analysis of federal court litigation strongly suggests that, contrary to popular belief, the burden imposed on defendants and the federal judiciary by meritless prisoners' civil rights lawsuits is greatly exaggerated. First, the number of prison-related civil rights lawsuits has increased in proportion no more than the number of nonprison-related civil rights lawsuits. Eisenberg, "Section 1983: Doctrinal Foundations and an Empirical Study," 67 *Cornell L.R.* 482, 523 (1982). The study concludes:

> [T]he sheer volume of section 1983 cases poses no serious threats to the federal court system. Section 1983 cases neither place unbearable burdens on the courts nor direct massive resources to relatively minor cases.

*Id.* at 524. Additionally, of the prisoner-initiated civil rights lawsuits filed, all but a few are disposed of without trial. *Id.* at 617-18.

liability is to provide inmates their constitutionally mandated rights. If they were to do so, the entire debate about their dubious need for absolute immunity would be purely academic.

## VII. The Public's Compelling Interests In Deterring And Compensating For Unconstitutional Conduct Far Outweighs Hearing Officers' Interest In Evading Financial Liability For Their Unconstitutional Acts.

Because of the intrinsic obstacles to an objective evaluation of the facts, adherence at a prison disciplinary hearing to fundamental constitutionally mandated procedures at a prison disciplinary hearing is critical. At a minimum, the elementary constitutional safeguards prescribed by *Wolff v. McDonnell* and its progeny offer an inmate an initial opportunity to try to convince a hearing officer of his or her innocence. That the number of constitutionally required procedures, let alone the number of procedural safeguards provided in New York and other states, is so few, ensuring they are provided is undoubtedly a simple task. Conversely, failing to provide an inmate with his or her constitutional due process rights, thereby depriving the inmate of even a basic chance to present a meaningful defense, creates a blatant mockery of the proceedings.

The federal civil rights statutes and the corresponding *Bivens* rights doctrine exist both to afford meaningful compensation to individuals whose federal constitutional rights were violated by governmental officials, and to deter their unconstitutional conduct. *See Scheuer v. Rhodes*, 416 U.S. at 238; *Monroe v. Pape*, 365 U.S. 167 (1961). The doctrine of absolute immunity enables governmental officials to disregard utterly an individual's constitutional rights without concern that they will be held financially accountable despite their intentions. Because of this harsh result, this Court has repeatedly emphasized that absolute immunity should be granted only in exceptional circumstances. *See Harlow v. Fitzgerald*, 457 U.S. 800, 814-15 (1982); *Nixon v.*



*Fitzgerald*, 457 U.S. 731, 747 (1982); *Butz v. Economou*, 438 U.S. at 507; *Wood v. Strickland*, 420 U.S. 308, 320 (1975); *Scheuer v. Rhodes*, 416 U.S. at 242-45.

Given the nonadversarial nature of prison disciplinary systems, their focus on apportioning punishment rather than determining the facts, the hearing officers' lack of insulation from outside pressures, and the absence of a great many other judicially comparable procedural safeguards, it is patent that the exceptional circumstances for granting absolute immunity do not exist in all but arguably a handful of state prison disciplinary systems. Conversely, the totally isolated setting of a prison discipline hearing, insulated as few other government hearings are from public scrutiny, the ease with which prison hearing officers can comply with their constitutional obligations if they choose to do so, and the irreversible harm suffered by inmates whose constitutional due process rights are violated makes the possibility of a damage award to control unconstitutional conduct compelling as a matter of public policy. To flout such paramount public policy interests by conferring absolute immunity on disciplinary hearing officers will irrevocably ratify the prediction that this Court's "noble holdings [are] little more than empty promises." *Wolff v. McDonnell*, 418 U.S. at 581 (Marshall, J., dissenting).

## VIII. Conclusion.

For these reasons, *amici* respectfully submit that the judgment and order of the Court below should be affirmed.

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## APPENDIX A

### Statements Of Interest Of Individual Organizations *Amici Curiae*

*Prisoners' Legal Services of New York, Inc.* is a six-office, non-profit, public interest law firm which provides legal representation to indigent inmates incarcerated in correctional facilities throughout the State of New York. PLS advocates represent state inmates on civil matters, primarily relating to inmates' conditions of confinement.

*The National Conference of Black Lawyers* is a non-profit legal association of lawyers and legal workers organized in 1968. NCBL performs a broad range of legal support work around issues which impact the poor and communities of color. NCBL has a special interest in cases involving the incarcerated because people of color and the poor are disproportionately represented in prisons throughout the United States.

*The National Lawyers Guild* is a forty-nine year old organization composed of lawyers, judges, law professors, legal workers, and law students, that has consistently defended the civil rights of indigents and other minority groups throughout the country. The Guild carries out litigation, educational, and organizational efforts in the pursuit of social justice.

*The National Legal Aid and Defenders Association* (NLADA) is a private, non-profit, national membership organization headquartered in Washington, D.C. whose purpose is to ensure the availability of quality legal services in civil and criminal cases to all persons unable to retain counsel. Specifically, NLADA represents approximately 1,753 programs engaged in providing representation to indigents accused of criminal offenses. The membership of NLADA, therefore, comprises most

public defender offices and legal services agencies around the nation, as well as assigned counsel plans and private practitioners. Consequently, NLADA has a vital interest in the issue of whether hearing officers at disciplinary hearings within prisons are entitled to absolute immunity, since the individuals who regularly appear before such officers are indigent, and NLADA's membership represent these indigents on a daily basis.

*The Alabama Prison Project* is an affiliate of the Southern Coalition on Jails and Prisons. It is a non-profit organization which supports the rights of prisoners and their families, opposes the death penalty, and seeks alternatives to incarceration. The APP answers letters from inmates and attempts to resolve problems that arise in the prisons, including those related to treatment of prisoners during disciplinary hearings.

*The Southern Poverty Law Center* (the Center) is a non-profit law firm located in Montgomery, Alabama, that specializes in the defense and enforcement of constitutional rights, particularly those of the less fortunate, throughout the Southeastern United States. For a number of years, the Center has served as counsel for the class of all prison inmates throughout the State of Alabama, in a statewide prison conditions suit, and a number of its other clients are prisoners whose constitutional rights the Center seeks to enforce.

*The Jerome N. Frank Legal Services Organization (L.S.O.)* is the clinical legal education program of the Yale Law School. L.S.O. coordinates state legal assistance programs under faculty supervision for individuals who cannot obtain or afford quality legal services. Among the



populations which are served are state and federal prisons throughout Connecticut. Since its founding in 1970, L.S.O.'s primary assistance projects have counseled almost 5,000 state and federal prisoners. L.S.O. assists prisoners in the areas of prison disciplinary proceedings, parole and sentencing problems, and state and federal post-conviction proceedings. L.S.O. has participated as appellate council in cases before the First, Second, and District of Columbia Circuits as well as before the Supreme Court of the United States. L.S.O. has also appeared as an *Amicus Curiae* in the Supreme Court of the United States and in several Circuits.

*The Florida Justice Institute, Inc.* is a not-for-profit public interest law organization established in 1978 by leaders of the private bar to advocate for humane treatment for institutionalized persons. The Institute is currently involved in numerous cases to improve conditions within Florida's prisons and jails. Funding for this work is provided by the Florida Bar Foundation.

*Legal Services For Prisoners, Inc.* (Kansas) is a private, non-profit, state funded corporation. LSP was founded in 1972, and provides legal services to all indigent inmates in the Kansas penal system, including representing inmates in prison disciplinary hearings.

*The Prisoners Assistance Project of the Legal Aid Bureau, Inc.* provides legal services to more than 13,000 inmates in the state prisons of Maryland. The Project assists inmates with the preparation of their civil rights complaints, petitions for federal *Habeas Corpus* and other meaningful legal papers.

*Appendix A—Statements Of Interest Of Individual Organizations Amici Curiae.*

*The Gay Community News Prisoner Project* receives 80 to 100 letters per week from prisoners across the nation, many of them in Federal prisons. They detail with abundant clarity how the anti-gay prejudices of the society at large are mirrored in the disciplinary actions of the prison officials. It would be extremely damaging to their constitutional rights for disciplinary system hearing officers to be granted absolute immunity.

*Massachusetts Correctional Legal Services* is a non-profit corporation which provides legal assistance, advice and representation to prisoners in state and county institutions in Massachusetts. The organization's main purpose is to enforce and further the basic civil rights of incarcerated men and women, and its staff attorneys have participated in numerous administrative hearings and litigated cases concerning prisoners' rights in disciplinary hearings.

*The Mississippi Chapter of the National Conference of Black Lawyers* is a legal organization consisting of fifty (50) attorneys and legal workers. One of the primary purposes of the organization is to assist incarcerated persons in seeking redress for deprivation of their constitutional and statutory rights.

*The New York State Defenders' Association* is a non-profit association comprised of lawyers and non-lawyers devoted to improving the quality of criminal defense representation for indigents. The Association studies public defense systems, compiles and analyzes data, and provides technical and legal assistance to localities and public defense attorneys throughout this state. The Association frequently receives requests from state



*Appendix A—Statements Of Interest Of Individual Organizations Amici Curiae.*

inmates facing disciplinary hearings on alleged infractions and is uniquely concerned with the issue raised by this case as to whether or not disciplinary hearing officers are entitled to absolute immunity.

*Keystone Legal Services, Inc.,* has two state correctional institutions within its five-county service area, in central Pennsylvania, which house over 3,000 inmates. Over the years, our organization has provided legal advice and representation to inmates within our service area concerning prison conditions and practices and parole. As an organization that assists low-income individuals, we are striving to improve the rights and conditions under which the average inmate must live.

*The Defender General of the State of Vermont* is authorized by state law to provide legal services to all those who are incarcerated in the custody of the Vermont Commissioner of Corrections. Included among the services provided to Vermont inmates is legal representation of those who seek to challenge adverse decisions of institutional disciplinary committees in either state or federal court.

*The Institutional Legal Services Project of Evergreen Legal Services* is a Washington State funded organization. ILSPELS provides legal services to three of the major prisons in the state of Washington. Its duties include pretrial services in the courts, post-conviction remedies, and prison displinary hearings assistance. The ILSPELS has a special interest in cases involving prisons and prison officials.

*Appendix A—Statements Of Interest Of Individual Organizations Amici Curiae.*

*Wisconsin Correctional Services, Inc.*, was founded in 1912, under the name of Society for the Friendless. WCS was incorporated in 1940 as a non-profit organization. WCS runs forty programs to assist correctional clients with problems ranging from drug and alcohol dependency, to helping mentally ill individuals. Some of the programs WCS runs include halfway houses, drug residency programs, and pre-release support groups. Finally, WCS serves approximately 5,000 clients per year, and employs a staff of 160 individuals.